92-1455

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and its Milwaukee Branch (NAACP), CELESTINE LINDSEY, DOROTHY LISTENBEE, JAMES MILNER, DIANE PRATT, MARVIN PRATT, SIMON WILLIAMS, BEVERLY WILLIAMS, and LOIS WOODS, individually and as representatives of a class of all similarly situated persons,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fair Housing Act prohibit racial discrimination in the sale of homeowners' insurance?

2. Does the McCarran-Ferguson Act preclude the administrative or judicial application of the Fair Housing Act to state-regulated insurance sales?

PARTIES

The names of all of the parties appear in the caption. Petitioner American Family Mutual Insurance Company is a mutual insurance corporation established and regulated under the Wisconsin Insurance Code. It has no parent company, and all of its subsidiaries are wholly owned, either directly or through other wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

American Family Mutual Insurance Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 20, 1992, and the order denying the company's petition for rehearing and suggestion for rehearing *en banc* entered on December 7, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 978 F.2d 287 and is reprinted in the appendix ("App.") to this petition. App., pp. 1a-27a. The subsequent order denying the petition for rehearing and suggestion for rehearing *en banc* is not reported. It is reprinted in the appendix at p. 34a.

The decision of the United States District Court for the Eastern District of Wisconsin (Stadtmueller, J.), which the Court of Appeals reversed in part and affirmed in part, was rendered from the bench. It has not been reported. The transcript of the relevant portion of that oral decision is reprinted in the appendix at pp. 28a-31a.

JURISDICTION

The Court of Appeals entered its judgment on October 20, 1992. In an order entered on December 7, 1992, the court denied a timely petition for rehearing and suggestion for rehearing *en banc*. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1) and Supreme Court Rules 13.1 and 13.4.

FEDERAL STATUTES AND REGULATIONS INVOLVED

Fair Housing Act (Title VIII, Civil Rights Act of 1968, as amended)

42 U.S.C. § 3604 provides in part:

Discrimination in the sale or rental of housing and other prohibited practices.

As made applicable by section 803 [42 U.S.C. § 3603] and except as exempted by sections 803(b) and 807 [42 U.S.C. §§ 3603(b), 3607], it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race. . . .

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race. . . .

42 U.S.C. § 3605 provides in part:

Discrimination in residential real estate-related transactions.

(a) In general. It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race. . . .

(b) As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance—

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

* * * *

42 U.S.C. § 3614a. **Rules to implement title.**

The Secretary [of Housing and Urban Development] may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this title. . . .

24 CFR § 100.70 provides in part:

> (b) It shall be unlawful, because of race . . ., to engage in any conduct relating to the provision of housing or of services therewith that otherwise makes unavailable or denies dwellings to persons.
>
> * * * *
>
> (d) Prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to:
>
> * * * *
>
> (4) Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race. . . .

McCarran-Ferguson Act

> 15 U.S.C. § 1012(a) **State regulation.** The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) **Federal regulation.** No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, and the . . . Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

STATE STATUTES AND REGULATIONS INVOLVED

Wis. Stats. § 101.22 provides in part:

> (1m) DEFINITIONS. In this section:
>
> * * * *
>
> (h) "Discriminate" means to . . . treat a person or class of persons unequally in a manner described in sub. (2) . . . because of . . . race. . . .
>
> * * * *

(2) DISCRIMINATION PROHIBITED. It is unlawful for any person to discriminate:

* * * *

(e) For a person in the business of insuring against hazards, by refusing to enter into, or by exacting different terms, conditions or privileges with respect to, a contract of insurance against hazards to a dwelling.

Wis. Stats. § 625.11(1) provides in part:

Rate standards. (1) General. Rates shall not be excessive, inadequate or unfairly discriminatory. . . .

Wis. Stats. § 628.34(3) provides in part:

(3) UNFAIR DISCRIMINATION. (a) No insurer may unfairly discriminate among policyholders by charging different premiums or by offering different terms of coverage except on the basis of classifications related to the nature and the degree of the risk covered or the expenses involved. . . .

Wis. Admin. Code § Ins 6.68 provides in part:

Ins 6.68 Unfair discrimination based on geographic location or age of risk. (s. 628.34, Stats.). . . .

(3) SPECIFIC EXAMPLES OF UNFAIR TRADE PRACTICES UNDER S. 628.34, STATS. The following are hereby identified as specific acts or practices which are unfairly discriminatory.

(a) Making . . . any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, cancelling or limiting the amount of insurance coverage on a property or casualty risk because of the geographic location of the risk, unless:

1. The refusal, cancellation or limitation is for a business purpose which is not a mere pretext for unfair discrimination, or

2. The refusal, cancellation or limitation is required by law or regulatory mandate.

STATEMENT OF THE CASE

Nature of the case. "Redlining," whether practiced by a financial institution, an insurance company, or a governmental body, is reprehensible. It has come to mean, as a pejorative term, invidious discrimination—by race or by geography—that denies people loans or services solely because of where they live or who they are.

The U.S. Court of Appeals for the Seventh Circuit, construing an admittedly ambiguous statute, now has made redlining in the sale of homeowners' insurance subject to the Fair Housing Act. The issue this case presents to the Supreme Court is not whether redlining is wrong—it is—or whether the practice should be regulated and proscribed—it is already, by the states. The issue is whether a federal appellate court, relying primarily on a federal agency's new regulations, can set aside the command of the McCarran-Ferguson Act that, for almost 50 years, has preserved for the states their traditional responsibility for regulating insurance.

"Is redlining in the insurance business a form of racial discrimination violating the Fair Housing Act?" The first line of Judge Easterbrook's opinion for the Court of Appeals puts the question succinctly. To answer the question affirmatively, however, the court found it necessary to reverse one of its own decisions and to contradict, explicitly, the decisions of the Second and Fourth Circuits. Yet it is not just the conflict among the circuits that commends this case to this Court, for the decision raises fundamental questions about judicial deference to administrative regulations and the allocation by Congress, repeatedly recognized by this Court, of the regulatory authority for the "business of insurance" to the states.

Insurance companies evaluate risk and, to provide risk protection, they apportion its costs among the people and organizations they insure. It is a complex process that involves a broad range of factors—age and driving record for example, in automobile insurance; building condition

and replacement cost, for example, in property insurance. Far from violating any law, an insurance company that charges higher rates for greater risks is engaging in the very "core" of the business of insurance. "Risk discrimination," the Court of Appeals emphasized, "is not race discrimination." App. at 3a.

To ensure that permissible risk discrimination does not disguise impermissible racial discrimination, Wisconsin and the other states have imposed a comprehensive regulatory framework on the insurance industry that reflects the particular needs of each state. Without Congressional authorization, however, the Department of Housing and Urban Development and, now, a federal court based on HUD's regulations, have superimposed a federal statute written in very general terms over that system of specific state regulation.

The decision's significance can be measured by the breadth and immediacy of its impact. With the Seventh Circuit's opinion, more than 1,000 insurance companies that insure millions of family homes across this country become subject, for the first time, to federal regulation as well as to state regulation of their sales practices. That may be warranted, as a matter of public policy, because racial discrimination is intolerable in any form. Yet, if federal regulation is warranted, if the states have failed to regulate the insurance industry sufficiently, then that is a decision for Congress—not for the federal judiciary and certainly not for a federal agency.

Procedural history. The plaintiffs—the NAACP, its Milwaukee branch, and eight African-American homeowners in Milwaukee—filed their class action complaint on July 27, 1990. They alleged that the petitioner, American Family Mutual Insurance Company ("American Family"), discriminated on the basis of race in the sale of homeowners' insurance. The complaint alleged that American Family's insurance sales practices violated the Fair Housing Act (Title VIII of the Civil Rights Act of

1968, 42 U.S.C. §§ 3601 *et seq.*), the Civil Rights Acts of 1870 and 1866 (42 U.S.C. §§ 1981 and 1982), Wisconsin's fair housing law (Wis. Stats. § 101.22(2)(e)), and the Wisconsin Insurance Code (Wis. Stats. §§ 625.11(1) and 628.34(3); Wis. Admin. Code § Ins 6.68).

American Family answered the complaint, denying that it had engaged in any racially discriminatory conduct, and moved to dismiss the federal Fair Housing Act and state insurance law claims under Fed. R. Civ. P. 12(b) for failure to state a claim upon which relief can be granted. On the Fair Housing Act claim, American Family specifically contended that the Act's proscription of discriminatory housing practices does not apply to the sale of homeowners' property and casualty insurance.

The district court agreed, granting the company's motion to dismiss the claims on December 11, 1990. It relied on "the most significant case in this area," App. at 29a, the U.S. Court of Appeals' decision in *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984), which found the Fair Housing Act inapplicable to insurance sales. Judge Stadtmueller noted in his bench decision that Congress repeatedly had rejected proposals introduced after the *Mackey* decision to amend the Fair Housing Act to prohibit discriminatory insurance practices. App. at 29a.

In dismissing the Fair Housing Act claim, the district court declined to be bound by regulations issued in 1989 by the U.S. Department of Housing and Urban Development (HUD) that define the Fair Housing Act's "prohibited practices" to include "[r]efusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race. . . ." 24 CFR § 100.70(d)(4). Those regulations, the court said, were promulgated "without any statutory authority. . . ." App. at 29a. The district court also found that the state insurance code provides no private right of action for

racial discrimination in the sale of homeowners' insurance policies.[1]

On December 17, 1990, the district court entered a final judgment under Fed. R. Civ. P. 54(b) that dismissed the Fair Housing Act and state insurance code claims. Judge Stadtmueller directed the entry of a final judgment, making his decision immediately appealable, because the trial court's backlog provided "sufficient time" for the parties to "revisit" those claims if the Court of Appeals reversed the decision. R. 22 at p. 41.

The plaintiffs appealed to the U.S. Court of Appeals for the Seventh Circuit, which affirmed the dismissal of the state law claim but reversed the district court's Fair Housing Act decision. *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), App. at 1a-27a. The Court of Appeals recognized at the outset that "[a]ny effort to use federal law to prescribe or penalize the behavior of insurers must reckon with the McCarran-Ferguson Act," 15 U.S.C. §§ 1011 *et seq.* App. at 9a. The statute is a form of "inverse preemption," Judge Easterbrook wrote for the court, that since 1945 has preserved the states' power to regulate the "business of insurance." McCarran-Ferguson could block any application of the Fair Housing Act to insurers.

Contradicting the Second Circuit's decision in *Spirt v. Teachers Ins. and Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), and several district court decisions,[2] the Sev-

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[1] The parties agree that Wisconsin's fair housing law, Wis. Stats. § 101.22(2)(e), creates a private remedy for racial discrimination in insurance sales. A person (or the state) alleging a violation of that statute "may bring a civil action for injunctive relief, for damages, including punitive damages, and, in the case of a prevailing plaintiff, for court costs and reasonable attorneys fees." Wis. Stats. § 101.22(6m)(a).

[2] *EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256 (N.D. Ohio 1981), *aff'd in part and rev'd in part*, 727 F.2d 566 (6th Cir. 1984); *Women in City Government United v. New York*, 515 F. Supp. 295

enth Circuit rejected the plaintiffs' argument that the McCarran-Ferguson Act does not apply to subsequently enacted civil rights legislation like the Civil Rights Act of 1968. App. at 10a-13a. But that threshold determination did not resolve the case.

The Seventh Circuit next concluded that the McCarran-Ferguson Act, while governing the interpretation of the Fair Housing Act, still does not prevent that statute from reaching property and casualty insurers. Explicitly overruling its own decision in *Lowe v. AARCO-American, Inc.*, 536 F.2d 1160 (7th Cir. 1976) (per curiam), the court held that a federal statute duplicating a state insurance law does not necessarily "invalidate, impair, or supersede" the state law in violation of McCarran-Ferguson, even though the federal law provides different remedies. App. at 13a-16a. If the Fair Housing Act merely prohibits the same insurance practices the Wisconsin Insurance Code prohibits, the court concluded, the McCarran-Ferguson Act does not insulate insurers from simultaneous federal and state regulation. *Id.* at 16a. "Duplication," the court said, "is not conflict." *Id.* at 13a.

With the McCarran-Ferguson Act issue resolved, the Court of Appeals next asked whether the Fair Housing Act actually covers the sale of homeowners' insurance. It quickly disposed of the plaintiffs' assertion that section 3605 applies to insurers, noting that insurers do not provide "financial assistance" to home buyers. *Id.* at 16a-17a. The court then turned to section 3604, which makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race," 42 U.S.C. § 3604(a), or to "discriminate against any person in the . . . sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race," 42 U.S.C. § 3604(b).

(S.D.N.Y. 1981); *Ben v. General Motors Acceptance Corp.*, 374 F. Supp. 1199 (D. Colo. 1974).

Refusing to sell insurance "make[s a dwelling] unavailable" under section 3604(a), the plaintiffs argued, and property insurance is a "service" rendered "in connection" with the sale of a dwelling under section 3604(b). The Court of Appeals found the statute ambiguous. "Nothing in the text of the statute permits us to reject [the plaintiffs'] proposed readings," the court said. App. at 18a. But, it added, "[a]lthough § 3604 could bear the reading plaintiffs propose, it need not." *Id.* The court resolved the ambiguity by rejecting the Fourth Circuit's decision on the identical issue and by deferring to a federal agency's recent interpretation of the statute.

The Fourth Circuit had concluded in *Mackey* that the Fair Housing Act does not apply to insurers. Section 3604 "does not proscribe the alleged hazard insurance redlining practice," the court held, because "there is no mention in the Fair Housing Act of insurance" and because there was no evidence Congress intended to apply the Act to the insurance industry. 724 F.2d at 423. The Seventh Circuit found that reasoning unpersuasive. App. at 19a-23a. Rather than attempting to construe the statute independently, however, the Seventh Circuit simply deferred to the HUD regulations, promulgated 21 years after Congress enacted the Fair Housing Act and five years after the *Mackey* decision, that define racial discrimination in insurance sales as a prohibited practice. 24 CFR § 100.70(d)(4). Section 3604 is "sufficiently pliable that its text can bear the Secretary's construction," the Court of Appeals said, and it accepted that "plausible construction." App. at 23a.

In concluding the opinion, the three-judge panel said that it had been circulated to all of the Seventh Circuit's active judges, acknowledging the impact of the decision: "[T]his opinion overrules *Lowe* to the extent that *Lowe* holds that the McCarran-Ferguson Act prevents the application of federal laws duplicating state rules, and . . . it conflicts with both the second circuit's views in *Spirt* and the fourth circuit's holding in *Mackey*. . . ." *Id.* at

27a. The Court of Appeals remanded the case for trial, which is now scheduled to begin February 6, 1995.

The trial court decided this case on American Family's motion to dismiss. Accordingly, the Court of Appeals "assume[d]" that the plaintiffs could prove "disparate treatment [by race] and not just a disparate impact of decisions made on actuarial grounds." App. at 2a-3a. However, to prevail at trial in this case under the Fair Housing Act, the court said, the plaintiffs need only prove that the insurance practices at issue had a disparate impact and *not* that they were the result of intentional racial discrimination, the heavier burden of proof the plaintiffs must carry on all of their other claims. *Id.* at 7a-8a; *see infra*, n.3.

In response to the Seventh Circuit's October 20, 1992, decision, American Family filed a petition for rehearing and suggestion for rehearing *en banc*. That petition addressed the panel opinion's characterization and assignment of the burden of proof under the Fair Housing Act on remand. The Court of Appeals denied the petition in an order entered on December 7, 1992. App. at 34a.

Lower courts' jurisdiction. The district court had jurisdiction over the plaintiffs' federal claims under 28 U.S.C. §§ 1331 and 1343(a). It had jurisdiction over their state law claims under the doctrine of pendent jurisdiction. The Court of Appeals had jurisdiction over the plaintiffs' appeal under 28 U.S.C. § 1291.[3]

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[3] The Court of Appeals initially questioned whether it had appellate jurisdiction because it was uncertain whether the trial court's final judgment on the Fair Housing Act claim was appropriately entered under Rule 54(b). It concluded that the plaintiffs' burden of proof on that claim could be more easily sustained than their burden under their other legal theories, making their Fair Housing Act allegations a distinct claim on which the district court properly entered final judgment. App. at 8a. "If [the plaintiffs] prevail under Title VIII, they obtain all the relief they seek; if they lose at trial under Title VIII, they necessarily lose on all other theories. . . ." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION TO APPLY THE FAIR HOUSING ACT TO HOMEOWNERS' INSURANCE CONFLICTS WITH THE FOURTH CIRCUIT, AND ITS DEFERENCE TO ADMINISTRATIVE RULES IGNORES THIS COURT'S DECISIONS.

Now, two Courts of Appeals have addressed the applicability of the Fair Housing Act to insurance companies and reached opposite results. The Fourth Circuit in *Mackey v. Nationwide Ins. Cos.*, *supra*, held that section 3604 does not apply to an insurer's refusal to sell property insurance, whatever the motivation. The Seventh Circuit has held, in contrast, that section 3604 does prohibit discrimination in the sale of homeowners' insurance. Indeed, at least for this case, the Seventh Circuit has eliminated any requirement under the Fair Housing Act that a plaintiff prove intentional discrimination in addition to disparate impact.[4] Only this Court can resolve the conflict on this issue of national importance.

A. The Fair Housing Act, As The Fourth Circuit Has Held, Does Not Apply To Insurance Sales.

The Fourth Circuit in *Mackey* refused to extend section 3604 to insurance sales for several reasons. First, it noted that section 3605 specifically prohibits discrimination in providing financial assistance. If section 3604's general "otherwise make unavailable" language were intended to "reach every discriminatory act that might conceivably affect the availability of housing," the court said, then section 3605's specific prohibition of discrimination in financing would be superfluous. 724 F.2d at 423.

The nature of insurance—its classification and rating of risks—distinguishes insurance from real estate financ-

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[4] This Court has not yet determined whether practices with a disparate impact violate the Fair Housing Act. *See Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988).

ing. While home mortgage lenders also face varying risks, sometimes depending on the neighborhood, the Fourth Circuit said, "the fact that Congress chose to proscribe discrimination in mortgage financing does not suggest that it would come to a similar conclusion with respect to hazard insurance." *Id.* Moreover, the court noted, "it has been the insistent position of Congress," expressed in the McCarran-Ferguson Act, "that regulation of the insurance industry be left to the states." *Id.*; *see infra* at 21-23.

Finally, the Fourth Circuit noted that bills to amend the Fair Housing Act to prohibit discrimination by the hazard insurance industry had been introduced in 1978, 1979 and 1980, but that none had been adopted. 724 F.2d at 424. "Since there is no reference to hazard insurance in the 1968 statute or in its legislative history," the court concluded, "the failure of the proposed amendments is supportive of our conclusion that the statute as enacted in 1968 was not intended to reach the hazard insurance industry." *Id.*

The Seventh Circuit rejected the Fourth Circuit's analysis. Section 3605's specific prohibition of discrimination in financing does not necessarily mean that section 3604 must be read narrowly, the court said, because the two sections could provide overlapping coverage. App. at 19a. The fact that insurers engage in risk classification is not a "principled ground to exclude insurers" from coverage because lenders, who also evaluate risk, are explicitly covered by the Fair Housing Act. *Id.* at 20a. Addressing *Mackey*'s final reason for holding the Act inapplicable, the Seventh Circuit found no significance in the mere introduction of unsuccessful proposals to amend the law. *Id.* at 22a-23a.

The Fourth Circuit, not the Seventh Circuit, correctly construed the Fair Housing Act. There is no doubt that Congress, when it enacted the statute, intended to attack redlining by financial institutions—section 3605 of the

Act clearly prohibits that practice.[5] It had become a pervasive problem that, Congress concluded, required federal legislation—legislation compatible, not incidentally, with the federal government's general regulation of the banking and savings and loan industries. The Court of Appeals in *Mackey* correctly recognized that Congress hardly could have intended that the Fair Housing Act apply to one national "risk" industry, insurance, through a generic phrase—"otherwise make unavailable"—while it responded to racial discrimination in another national "risk" industry, mortgage lending, with an express statutory prohibition. The Fourth Circuit reached that conclusion as much on common sense as on any rule of statutory construction. The McCarran-Ferguson Act, moreover, should make that common sense conclusion inescapable. *See infra* at 18-27.

B. The Court Of Appeals' Deference To HUD's Regulations Disregards This Court's Unanimous Decision In *Adams Fruit*.

"Congress created ambiguity," Judge Easterbrook wrote, when it prohibited discrimination "in the provision of services" for housing sales and rentals without defining "key terms." App. at 18a. Having found section 3604 ambiguous and having rejected the Fourth Circuit's analysis, the Seventh Circuit should have attempted to construe the statute based on its language and purpose. It did not. Instead, it simply deferred to HUD's construction of the statute, 21 years after its enactment, even though the Fair Housing Act has been invoked in this case not by HUD but by a private party, and even though the agency had no statutory authority to expand the scope of the law.

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[5] Congress also addressed mortgage redlining in the Home Mortgage Disclosure Act: "The Congress finds that some depository institutions have sometimes contributed to the decline of certain geographic areas by their failure pursuant to their chartering responsibilities to provide adequate home financing to qualified applicants on reasonable terms and conditions." 12 U.S.C. § 2801(a).

HUD has said the Fair Housing Act covers property and casualty insurance. Unlike the relevant provisions of the Act, the agency's regulations are not ambiguous: "Refusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race," according to HUD, is prohibited by the Fair Housing Act. 24 CFR § 100.70(d)(4). For the Seventh Circuit, that decided the case.

The Court of Appeals' deference to HUD's construction of the statute conflicts with this Court's unanimous holding in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990). Federal courts should not defer to an administrative agency's expansive interpretation of the scope of a statute's private judicial remedies, this Court said, because "an agency may not bootstrap itself into an area in which it has no jurisdiction." *Id.* at 650, quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

In *Adams Fruit*, the Court had to decide whether the private right of action created by the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801 *et seq.*, remains available to injured workers if their state's workers compensation law provides an exclusive remedy for work-related injuries. The Department of Labor, which administers the statute, had issued a regulation that whenever state workers compensation remedies are available, those benefits provide the exclusive remedy for loss. 494 U.S. at 649.

Rejecting that statutory construction, this Court unanimously held that the judiciary "need not defer to the Secretary of Labor's view of the scope of [the AWPA] because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute." *Id.* Deference, the Court held, has limits:

> A precondition to deference under *Chevron* [*U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467

> U.S. 837 (1984),] is a congressional delegation of administrative authority. No such delegation regarding AWPA's enforcement provisions is evident in the statute. Rather, Congress established an enforcement scheme independent of the Executive and provided aggrieved farmworkers with direct recourse to federal court where their rights are violated. Under such circumstances, it would be inappropriate to consult executive interpretations of [the statute] to resolve ambiguities surrounding the scope of AWPA's judicially enforceable remedy.

Id. at 650. Although Congress "clearly envisioned, indeed expressly mandated a role for the Department of Labor in administering the statute," this Court said, that delegation "does not empower the Secretary to regulate the scope of the judicial power vested by the statute." *Id.* Accordingly, the administrative regulation was "not entitled to *Chevron* deference." *Id.*

The Seventh Circuit should have applied that rationale here. The Fair Housing Act, like the AWPA, provides individuals with "direct recourse to federal court where their rights are violated." *Id.* Under *Adams Fruit*, the Court of Appeals should have construed the Fair Housing Act without deference to HUD's interpretation. Its failure to interpret the statute independently conflicts with this Court's mandate.

The Court of Appeals did recognize that its reliance on HUD's rules at least appeared inconsistent with *Adams Fruit*:

> We can imagine the response that courts do not defer to administrative constructions when judges, rather than administrators, hold the power of enforcement. Just as Congress authorized private litigation to enforce the [AWPA], the subject of *Adams Fruit*, so the Fair Housing Act is enforced by the courts at the instance of private persons believing themselves wronged.

App. at 23a-24a (citation omitted). However, the Seventh Circuit noted, Congress provided for administrative

enforcement in the Fair Housing Act as well as judicial enforcement and that, the court believed, made this case different:

> The Secretary's regulations would receive deference in an action to enforce HUD's administrative decision. It would be weird to say that [the Fair Housing Act] applies to insurers on judicial review of administrative actions but not when the litigation begins in district court.

Id. at 24a.

The Court of Appeals failed to recognize that the federal statute at issue in *Adams Fruit* also provides for administrative enforcement in addition to private judicial enforcement. The AWPA permits the Secretary of Labor to assess monetary penalties for statutory violations and provides the person assessed the right to an administrative hearing on the charges, followed by judicial review of any administrative action. *See* 29 U.S.C. § 1853. The "no deference" rule of *Adams Fruit* cannot be limited, therefore, to statutes that provide only a private right of action, with no administrative enforcement, because the statute construed in *Adams Fruit* itself contained both administrative and private remedies.

Federal courts, both before and since the decision in *Chevron*, have given "great weight" to an agency's administrative interpretation of a statute. App. at 24a. When Congress in 1988 gave HUD the authority to "make rules . . . to carry out" the Fair Housing Act, however, it did not give HUD the authority to rewrite the statute by making it specifically applicable to insurance companies even though Congress had made it specifically applicable only to financial institutions. Nor did Congress give HUD the authority to overrule a decision of the U.S. Court of Appeals. Congress, not the executive branch, certainly could have done either—by enacting a law that expanded the Fair Housing Act and, at the same time, satisfied the McCarran-Ferguson Act's requirement

that any such law "specifically relate[] to the business of insurance." Yet Congress did neither.

II. THE McCARRAN-FERGUSON ACT PREVENTS THE FAIR HOUSING ACT'S APPLICATION TO INSURERS WHETHER OR NOT THE FAIR HOUSING ACT ACTUALLY CONFLICTS WITH ANY STATE LAW.

The McCarran-Ferguson Act embodies Congress' determination that the regulation of the insurance industry is a matter best left to the states. In "a form of inverse preemption," App. at 14a, Congress gave the states virtually exclusive authority over the "business of insurance." 15 U.S.C. § 1012(a). McCarran-Ferguson allocates that regulatory authority to the states by creating a rule of statutory construction that ensures federal statutes do not "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance," 15 U.S.C. § 1012(b), *unless* Congress expressly intends that result. The McCarran-Ferguson Act itself specifically made some federal legislation applicable to the business of insurance—the Sherman Act, the Clayton Act, and the Federal Trade Commission Act—but only to the extent it already "is not regulated by state law." *Id.*

In light of McCarran-Ferguson, any application of the Fair Housing Act to insurers presents two distinct issues:

1) Does McCarran-Ferguson, enacted in 1945, apply to any subsequently enacted civil rights legislation? The Seventh Circuit in this case concluded that it does, a conclusion directly in conflict with the Second Circuit's decision in *Spirt v. Teachers Ins. and Annuity Ass'n*, *supra*.

2) Assuming construction of the Fair Housing Act *is* subject to the McCarran-Ferguson Act, does McCarran-Ferguson preclude an administrative agency and, in turn, a federal court, from expanding the Fair Housing Act to permit simultaneous federal and state regulation of the insurance business? Overruling its own precedent, the Seventh Circuit held in this case that McCarran-

Ferguson tolerates dual state and federal regulation as long as the state and federal rules do not actually conflict. That conclusion collides, however, with this Court's consistent application of McCarran-Ferguson to ensure the "continued supremacy of the States" in regulating the "business of insurance." *SEC v. National Securities, Inc.*, 393 U.S. 453, 459 (1969).

A. The Seventh Circuit's Application of McCarran-Ferguson To Subsequently Enacted Civil Rights Laws Conflicts With The Second Circuit.

This Court has never had to decide whether the McCarran-Ferguson Act applies to subsequently enacted civil rights legislation. In *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983), however, four Justices concluded that the McCarran-Ferguson Act does apply to Title VII of the Civil Rights Act of 1964. *Id.* at 1099-1103 (Powell, J., joined by Burger, C.J., and Blackmun & Rehnquist, JJ., concurring in part and dissenting in part). The other five Justices found it unnecessary to resolve the issue because even if McCarran-Ferguson does apply to Title VII, it would not have prohibited the application of Title VII to the challenged employment practice. *Id.* at 1087 n.17.[6]

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[6] The issue in *Norris* was whether a state-administered retirement plan for state employees violated Title VII by paying women retirees lower monthly benefits than men. The majority opinion in *Norris* noted that the challenged conduct involved an employment practice, not an insurance practice, that no insurance company had been joined as a defendant, and that the Court's decision would not preclude any insurance company from offering annuity benefits determined by gender-based actuarial tables. 463 U.S. at 1087 n.17. Accordingly, the majority concluded, the application of Title VII in that case could not possibly affect any state law governing the business of insurance. It was unnecessary, therefore, to determine whether Title VII " 'specifically relates to the business of insurance' within the meaning of the McCarran-Ferguson Act." *Id.*

In this case, in contrast, the petitioner *is* an insurance company, and the challenged practices—"deciding which risks [petitioner] will accept [and] at what price," App. at 10a—are at "the core of insurance." *Id.*; *see SEC v. National Securities*, 393 U.S. at 460. This case necessarily requires, therefore, a resolution of the issue

The Courts of Appeals are now divided on the issue. In *Spirt v. Teachers Ins. and Annuity Ass'n, supra*, the Second Circuit held that the McCarran-Ferguson Act does not apply to subsequently enacted civil rights statutes. It found the "historical context, the legislative history, and judicial interpretations of that history" dispositive. 691 F.2d at 1065. "Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as the business of insurance." *Id.*

The Seventh Circuit in this case rejected the Second Circuit's reasoning. "[*O*]*f course* Congress had no intention in the 1940s of curtailing the scope of laws yet to be enacted—indeed, inconceivable at the time." App. at 11a (emphasis in original). Yet the McCarran-Ferguson Act, the Seventh Circuit said, "could not be more comprehensive." *Id.* The statutory language "No Act of Congress" obviously does not mean "no act on the books in 1946" and certainly not "no act other than a civil rights statute." *Id.*[7]

The clash between the Second and Seventh Circuits occurs at the threshold: Does McCarran-Ferguson apply at all to the Fair Housing Act? Whether the McCarran-Ferguson Act governs the interpretation of all "Act[s] of Congress," as the Seventh Circuit concluded here, or

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on which the Second and Seventh Circuits have divided even though Judge Easterbrook accepted American Family's contention that McCarran-Ferguson does apply to all subsequently enacted federal legislation, including the Fair Housing Act.

[7] Even if the Second Circuit's restrictive interpretation of the McCarran-Ferguson Act were correct, it is clear that civil rights statutes enacted *before* 1945 still would remain subject to McCarran-Ferguson's limiting construction. The validity of the plaintiffs' section 1981 and 1982 claims under McCarran-Ferguson has not yet been addressed by the district court, and the issue was not before the Court of Appeals.

whether it has a more limited scope, as the Second Circuit believed, is an issue of national significance that only this Court can address definitively. Resolving that conflict, however, does not resolve the entire issue or this case.

Assuming the Seventh Circuit correctly held that McCarran-Ferguson reaches the entire body of federal law, the contours of its "inverse preemption" remain undefined. Does the statute permit simultaneous state and federal regulation of the business of insurance? To answer that question "yes," the Seventh Circuit had to overrule its own decision in *Lowe v. AARCO-American*, *supra*, which had reaffirmed the states' exclusive jurisdiction. Under the court's new interpretation of the McCarran-Ferguson Act, there now must be an actual conflict between state law regulating the business of insurance and a federal law that does *not* "specifically relate[] to the business of insurance," 15 U.S.C. § 1012(b), before McCarran-Ferguson bars the application of the federal law to insurers. Whether McCarran-Ferguson permits concurrent state and federal regulation of the business of insurance has become an open and troubling question as a result of the Seventh Circuit's decision in this case.

B. McCarran-Ferguson, This Court Has Held, Does Not Permit Simultaneous Federal And State Insurance Regulation, Whether Or Not There Is An Actual Conflict Between The Regulations.

The Seventh Circuit now says that the McCarran-Ferguson Act does not preclude simultaneous state and federal regulation of insurance sales practices, as long as the federal and state rules are essentially the same. That conclusion cannot be squared with this Court's repeated recognition that the McCarran-Ferguson Act assigns the entire field of insurance regulatory authority to the states, absent an explicit Congressional command to the contrary. McCarran-Ferguson, this Court has observed just recently, reflects Congress' "desire to reserve to the

States the regulation of the 'business of insurance.'" *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 410 (1990). The deciding principle is not the presence of an actual state-federal conflict but the states' occupation of the field of insurance regulation.

In *FTC v. National Casualty Co.*, 357 U.S. 560 (1957) (per curiam), for example, the Court held that the McCarran-Ferguson Act precludes the Federal Trade Commission from enforcing federal laws against deceptive trade practices by insurance companies in states that already have their own statutes prohibiting unfair practices. The Court rejected the FTC's argument that McCarran-Ferguson does not bar federal regulation where a state has not enforced its own regulations effectively. *Id.* at 564.

The *National Casualty* opinion embodies this Court's "understanding of McCarran as an act allocating power in a federal system." Spencer L. Kimball & Barbara P. Heaney, *Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism*, 1985 Utah L. Rev. 1, 20. The Court expanded on that understanding of McCarran-Ferguson in *SEC v. National Securities, Inc.*, *supra*. The purpose of the McCarran Act, the Court said, was to "turn back the clock" in response to its decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that insurance transactions are subject to federal regulation under the Commerce Clause. That decision, the Court observed, "threatened the continued supremacy of the States in this area," *National Securities*, 393 U.S. at 459, and Congress explicitly reinstated that state supremacy by enacting McCarran-Ferguson.

Congress passed the McCarran-Ferguson Act, 59 Stat. 34 (1945), "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." 393 U.S. at 459. McCarran-Ferguson did not "make the States supreme in regulating all the activities of insurance companies," the

Court noted. *Id.* Rather, "only when [insurers] are engaged in the 'business of insurance' does the statute apply." *Id.* at 459-60.

The Court then defined the "business of insurance" for which McCarran-Ferguson does, indeed, "make the States supreme":

> Certainly the fixing of rates is part of this business. . . . The selling and advertising of policies . . . and the licensing of companies and their agents . . . are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance. . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

Id. at 460.

Until this case, the Seventh Circuit honored the intent of McCarran-Ferguson and its purpose. In *Lowe v. AARCO-American*, *supra*, the plaintiffs alleged that the defendants' financing of insurance premiums violated the federal Truth in Lending Act. The court found that "[t]he particular elements of the 'business of insurance'" at issue in *Lowe* already "are regulated extensively by Illinois statutes." 536 F.2d at 1162. Accordingly, the court ruled, the McCarran Act "remov[ed] . . . [those] transactions from federal jurisdiction." *Id.* The fact that "there is no inconsistency between the Truth in Lending Act and the [state] disclosure requirements," it con-

cluded, is *not* a "compelling reason to restrict the full sway of the McCarran Act. . . ." *Id.*

By overruling *Lowe*, the Seventh Circuit's opinion in this case undermines the purpose and effect of the McCarran-Ferguson Act and this Court's application of it. The court acknowledged the "inverse preemption" of McCarran-Ferguson, App. at 14a, which is designed to ensure state supremacy in insurance regulation, and then ignored it. Permitting simultaneous federal regulation of insurers, as the Seventh Circuit now has done, nullifies the explicit determination by Congress that, unless a federal law "specifically relates to the business of insurance," the states *alone* are responsible for regulating "the business of insurance."

The Seventh Circuit did recognize that in some areas—labor law, for example—the rules of preemption prohibit any concurrent state and federal regulation. *Id.* at 13a-14a, citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). That principle is inapplicable here, the court contended, because it "rest[s] on a conclusion that Congress occupied the field of labor relations. . . ." App. at 14a. In other fields, the court observed, dual state and federal regulation is permissible as long as the state and federal rules "do not conflict with or displace each other." *Id.* at 16a.

Under McCarran-Ferguson's "inverse preemption" command, the court concluded, federal regulation of the business of insurance can "invalidate, impair, or supersede" state regulation *only* if the federal law actually "displaces states' choices about the proper conduct of the business of insurance." *Id.* Dual regulation, even if it creates potential conflict, is not enough, the court held—there must be actual conflict to trigger McCarran-Ferguson. The Court of Appeals found no conflict here as long as Wisconsin law and federal law both prohibit racial discrimination in the sale of homeowners' insurance.

Wisconsin provides a comprehensive regulatory structure that unequivocally prohibits racial discrimination

by all insurance companies doing business in the state. The state insurance code prohibits unfair discrimination by insurers in setting rates or in refusing to sell policies. Wis. Stats. §§ 625.11(1), 628.34(3); Wis. Admin. Code § Ins 6.68. Those provisions are enforced administratively by the state's Commissioner of Insurance. *See* Wis. Stats. § 601.41. In addition, Wisconsin's fair housing law also prohibits discrimination by insurers, explicitly and unambiguously, and provides a privately enforceable judicial remedy. *See* Wis. Stats. §§ 101.22(2)(e),(6m)(a); *see supra*, n. 1. Expanding the federal Fair Housing Act's coverage to insurers deprives the State of Wisconsin of its exclusive authority under McCarran-Ferguson to regulate insurance sales until Congress—not a federal agency and not a federal court deferring to that agency—determines that federal regulation is necessary.

For the Seventh Circuit, there must be a substantive difference between federal and state laws before those laws can "conflict." It failed to recognize that a conflict arises between state and federal law whenever one level of government even attempts to regulate within the other's exclusive domain. As this Court observed recently, "field pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." *English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990). To paraphrase Judge Easterbrook, "duplication *is* conflict."

In the field of insurance regulation, federal rules that duplicate the reach of state rules "conflict" with state regulation. In the language of McCarran-Ferguson, any federal attempt to regulate the business of insurance necessarily "impairs" state regulation because it conflicts with the decision of Congress to let the states exclusively regulate the business of insurance. The Seventh Circuit failed to acknowledge that.

Simultaneous state and federal regulation inevitably produces conflict because, as this Court has observed, "a

multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garmon*, 359 U.S. at 243, quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490-91 (1953). This case illustrates just that point well.

The Seventh Circuit believed that there is no conflict between Wisconsin insurance law and the Fair Housing Act because both prohibit redlining in insurance sales. App. at 16a. Yet its assignment of the burden of proof on the plaintiffs' various claims creates just such a conflict. On the Fair Housing Act claim, the Court of Appeals said, the plaintiffs can prevail by proving only disparate impact, a "lighter" burden than their state fair housing law claim, where they must prove intentional discrimination. The allocation of burdens of proof in discrimination cases, the appellate court recognized, "is bound to affect many cases, given the difficulty in drawing inferences." *Id.* at 4a. By suggesting that it is easier for the plaintiffs to prevail on their federal claim, the Court of Appeals has allowed the Fair Housing Act to "supersede" the state's more stringent requirements.

This Court's new decision in *Gade v. National Solid Wastes Management Ass'n*, —— U.S. ——, 112 S.Ct. 2374 (1992), emphasizes, moreover, that preemption does not necessarily require a conflict in laws. The Occupational Safety and Health Act of 1970 (OSH Act) permits states to develop occupational safety and health standards that, upon their approval by the Secretary of Labor, preempt federal standards. *Id.* at 2382. The issue before the Court in *Gade* was whether the OSH Act preempts state regulation of occupational safety in states whose safety and health standards have not been approved by the Secretary.

Concluding that the OSH Act does preempt such state laws, the Court's plurality opinion rejected the petitioner's argument, "drawn from Judge Easterbrook's separate opinion below, that the [OSH] Act does not pre-empt

nonconflicting state regulations at all." *Id.* at 2381 (O'Connor, J., joined by Rehnquist, C.J., and White and Scalia, JJ.). After reviewing the entire statute, the plurality determined that "Congress intended to subject employers and employees to only one set of regulations" at a time, "be it federal or state. . . ." *Id.* at 2383. "[T]he only way a State may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan that displaces the federal standards." *Id.*

The Seventh Circuit should have applied that analysis here. Congress enacted the McCarran-Ferguson Act to affirm the states' supremacy in regulating the "business of insurance." Section 1012(b) of McCarran-Ferguson carries out that policy by instructing courts and federal administrative agencies to avoid subjecting insurers to the burden of concurrent federal regulation *unless* Congress has enacted legislation that, in explicit and unambiguous terms, "specifically relates to the business of insurance." HUD may have tried to do that with its new regulations. The Seventh Circuit may have tried to do that with this decision. It is clear, however, that Congress has not.

The Seventh Circuit concluded its discussion of the Fair Housing Act by asking whether the HUD regulations are "tenable." App. at 24a. That question need never have been asked. The critical question is whether HUD, in light of the McCarran-Ferguson Act's requirement that a statute "specifically relate[] to the business of insurance" and the Fair Housing Act's failure to even mention insurance, had the authority to regulate the business of insurance through *any* regulations, "tenable" or not.

C. The Seventh Circuit's Decision Will Lead Inevitably To Jurisdictional Confusion And Inconsistent Regulation.

Almost 50 years ago, Congress drew a bright line between the federal government and the states to allocate

the responsibility for regulating the business of insurance. Indeed, it is difficult to imagine a brighter line than the McCarran-Ferguson Act. Just as Congress reserved for the federal government the exclusive authority to regulate labor relations in the National Labor Relations Act, it gave the states the exclusive authority to regulate the "business of insurance." It created a convenient mechanism, however, to avoid tying its hands in the future and to reserve for itself the final authority should the states fail their responsibility. Under McCarran-Ferguson, if Congress wants to regulate the business of insurance, supplementing or supplanting the regulatory authority of the states, it has only to say so in clear and explicit language. That is what McCarran-Ferguson requires. And that is precisely what has *not* happened here.

With the decision of the U.S. Court of Appeals in this case, McCarran-Ferguson's bright line has blurred. The states' regulatory authority is not exclusive after all. It is subject to concurrent regulation by the federal government—not regulation imposed by Congress but regulation imposed by a federal agency's rules and an appellate court's willingness to defer to them. The ultimate issue, of course, is not whether the bright line of McCarran-Ferguson is the right line but whether a federal court or an administrative agency, without the expressed authority of Congress, can redraw it.

There are more than 1000 insurance companies in this country that offer insurance protection against personal injury and property damage from virtually every imaginable peril. More than 96 percent of American homeowners have some form of hazard insurance, and they pay annual premiums that total over $19 billion.[8] To ensure that the "business of insurance" is conducted properly, that policies are sold and priced fairly, every state regulates the insurance companies that operate within

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[8] Insurance Information Institute, *The Fact Book*, p. 14 (1993); A.M Best Data Base Services, *Property Casualty Experience By State By Line* (1991).

its borders. Wisconsin, like most other states, has adopted statutes and regulations that explicitly prohibit and punish unfair discrimination, by race or by geography, in the sale of insurance policies. *See* Wis. Stats. §§ 101.22(2)(e), 625.11(1), 628.34(3). Indeed, the Seventh Circuit itself recognized that "Wisconsin maintains a substantial administrative apparatus regulating the conduct of insurers. . . ." App. at 26a.

There has been no finding, by the courts or by Congress, that the states have refused to acknowledge the potential for racial discrimination in the sale of insurance policies or to deal with its reality. Notwithstanding that, the Seventh Circuit with its decision has changed the McCarran-Ferguson Act. In the decision's wake, insurance practices have become subject to federal as well as to state anti-discrimination laws—in fact, to pervasive federal as well as state regulation, for their is no limiting principle anywhere in the opinion that restricts its application to the Fair Housing Act. From now on, the Seventh Circuit has held, the business of insurance is subject not only to state regulation but to *any* general federal law or regulation that does not conflict directly with those state regulations.

Since the Seventh Circuit issued its opinion in this case, the U.S. Department of Justice has undertaken a comprehensive investigation of insurance industry practices under the Fair Housing Act.[9] The Associated Press, "Department Investigating Home Insurance 'Redlining,'" Feb. 5, 1993 (available on Nexis). What had been a matter for the exclusive authority of the states under the McCarran-Ferguson Act, the regulation of the business of insurance, is no longer.

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[9] The 1988 amendments to the Fair Housing Act gave the Attorney General power to enforce the Act by bringing a civil action in district court. *See* 42 U.S.C. § 3614(a).

CONCLUSION

This case presents important questions of statutory construction—involving the Fair Housing Act, the McCarran-Ferguson Act and the power of federal agencies—that have divided the circuits. For the foregoing reasons, the Court should grant this petition for a writ of certiorari and review the decision of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-1176

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiffs-Appellants,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
No. 90-C-759—J. P. Stadtmueller, *Judge.*

ARGUED SEPTEMBER 19, 1991—DECIDED OCTOBER 20, 1992

Before COFFEY and EASTERBROOK, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* Is redlining in the insurance business a form of racial discrimination violating the Fair Housing Act? "Redlining" is charging higher rates or declining to write insurance for people who live in particular areas (figuratively, sometimes literally, enclosed

with red lines on a map). The NAACP, its Milwaukee Branch, and eight of its members contend in this class action that redlining violates the Fair Housing Act, 42 U.S.C. §§ 3601-19, and four other rules of state and federal law when insurers draw their lines around areas that have large or growing minority populations.

Plaintiffs contend that a mortgage loan usually is essential to home ownership, and that lenders are unwilling to provide credit unless the borrower obtains insurance on the house that serves as security for the loan. Higher premiums price some would-be buyers out of the market; a refusal to write insurance excludes all buyers. If insurers redline areas with large or growing numbers of minority residents, that practice raises the cost of housing for black persons and also frustrates their ability to live in integrated neighborhoods. Even if they achieve their goal, they pay extra.

The complaint asserts that American Family Mutual Insurance Company engages in redlining in and near Milwaukee. The district judge concluded that two of plaintiffs' five theories are legally insufficient. See Fed. R. Civ. P. 12(b)(6). Following *Mackey v. Nationwide Insurance Cos.*, 724 F.2d 419, 423-24 (4th Cir. 1984), he held that the Fair Housing Act (Title VIII of the Civil Rights Act of 1968) does not apply to the property and casualty insurance business. And he held that Wisconsin would not recognize a private right of action to enforce the anti-discrimination portions of its insurance code. At the conclusion of his oral ruling, the judge entered a partial final judgment on these two theories under Fed. R. Civ. P. 54(b).

Because the district judge dismissed claims under Title VIII and Wisconsin's insurance code in advance of discovery, we must assume that plaintiffs can establish that the defendant intentionally discriminates on account of race. That is, we must assume that the plaintiffs can establish

disparate treatment and not just a disparate impact of decisions made on actuarial grounds. The distinction is important not only because the Supreme Court has yet to decide whether practices with disparate impact violate Title VIII, see *Huntington v. NAACP*, 488 U.S. 15 (1988), but also because of the nature of insurance. Insurance works best when the risks in the pool have similar characteristics. For example, term life insurance costs substantially more per dollar of death benefit for someone 65 years old than for one 25 years old, although the expected return per dollar of premium is the same to both groups because the older person, who pays more, also has a higher probability of dying during the term. Auto insurance is more expensive in a city than in the countryside, because congestion in cities means more collisions. Putting young and old, or city and country, into the same pool would lead to adverse selection: people knowing that the risks they face are less than the average of the pool would drop out. A single price for term life insurance would dissuade younger persons from insuring, because the price would be too steep for the coverage offered; the remaining older persons would pay a price appropriate to their age, but younger persons would lose the benefits of insurance altogether. To curtail adverse selection, insurers seek to differentiate risk classes with many variables.

Risk discrimination is not race discrimination. Yet efforts to differentiate more fully among risks may produce classifications that could be generated by discrimination. Recall the dispute, in both courts and journals, whether separate annuity tables for women are sex discrimination. See *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); George J. Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489 (1982); Lea Brilmayer, et al., *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. Chi. L. Rev. 505 (1980). No insurer openly uses

race as a ground of ratemaking, but is a higher rate per $1,000 of coverage for fire insurance in an inner city neighborhood attributable to risks of arson or to racial animus?

A disparate treatment approach assigns burdens of proof and persuasion to the plaintiff, while a disparate impact approach places them on the insurer. Allocation of these burdens is bound to affect many cases, given the difficulty in drawing inferences. For example, a recent study by the Federal Reserve System concluded that black applicants for mortgage loans are more likely to be turned down, holding income constant. Glenn B. Canner & Dolores S. Smith, *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 Fed. Res. Bull. 859, 868-76 (1991). Is this attributable to applicants' race, to the fact that they seek loans that are larger multiples of their average wealth, or to difficulties of obtaining insurance that may (or may not) themselves have a racial component? The Federal Reserve reported data on applicants' income but not their wealth or the value of the loans sought, both important variables. The greater the uncertainty in drawing inferences, the more the placement of the burden matters. We mention this not to resolve the question but to make clear that we have not done so by indirection. All we decide is whether the complaint states claims on which the plaintiffs may prevail if they establish that the insurer has drawn lines according to race rather than actuarial calculations.

I

Appellate jurisdiction is the first question. Rule 54(b) allows a court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties" but does not employ a special meaning of "final". So it does not authorize appeal of decisions that, if made in stand-alone litigation, would not be final. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976); *Horn*

v. Transcon Lines, Inc., 898 F.2d 589 (7th Cir. 1990). Unless the court enters judgment on an entire "claim," or wraps up the case with respect to all claims involving a particular party, Rule 54(b) does not permit an immediate appeal. *Steve's Homemade Ice Cream, Inc. v. Stewart*, 907 F.2d 364 (2d Cir. 1990); *FDIC v. Elefant*, 790 F.2d 661, 664 (7th Cir. 1986); *Horn*, 898 F.2d at 593-95.

The district judge did not discuss the legal and factual overlap between the two counts being dismissed and the three being retained and did not explain why he viewed them as separate claims. A "claim for relief" seeks redress of a distinct wrong; a distinct legal underpinning differs from a new claim and is not independently appealable. *A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc.*, 725 F.2d 1140, 1142-43 (7th Cir. 1984). Yet the district judge appears to have equated theories with claims. He observed that because a trial lay more than a year in the future there was ample time to resolve these two legal disputes on appeal so that all theories could be handled during one trial. This suggests that the judge confused Rule 54(b) with 28 U.S.C. § 1292(b), which permits a court to certify the case for discretionary appeal when interlocutory resolution of important issues could advance the final disposition of the litigation. Because of the mismatch between the district court's stated rationale and the scope of Rule 54(b)—and the apparent overlap of the two dismissed counts with the three retained—our jurisdiction is in doubt.

Plaintiffs' complaint begins with 66 paragraphs and then states five "claims," each of which incorporates these paragraphs and asserts one reason why the conduct is wrongful. The Fair Housing Act and the state insurance code are two. The other three: Wisconsin's Fair Housing Act, 42 U.S.C. § 1981 (the right to be free of racial discrimination in making contracts), and 42 U.S.C. § 1982 (the right to be free of racial discrimination in buying

real property). Perhaps the judge was led astray by the structure of the complaint. Identifying legal theories may assist defendants and the court in seeing how the plaintiff hopes to prevail, but this organization does not track the idea of "claim for relief" in the federal rules. Putting each legal theory in a separate count is a throwback to code pleading, perhaps all the way back to the forms of action; in both, legal theory and facts together created a "cause of action." The Rules of Civil Procedure divorced factual from legal aspects of the claim and replaced "cause of action" with "claim for relief" to signify the difference. *Bartholet v. Reishauer A.G. (Zürich)*, 953 F.2d 1073, 1078 (7th Cir. 1992). A complaint should limn the grievance and demand relief. It need not identify the law on which the claim rests, and different legal theories therefore do not multiply the number of claims for relief.

One set of facts producing one injury creates one claim for relief, no matter how many laws the deeds violate. *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir. 1986); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, No. 91-1247 (7th Cir. Aug. 28, 1992), slip op. 8-11. Plaintiffs could not litigate and lose a suit asserting that American Family's redlining violates Title VIII, pursue another asserting that redlining violates § 1981, and then crank up a third asserting that redlining violates § 1982. If these principles—well understood when dealing with the preclusive effects of judgments—define a "claim" for purposes of Rule 54(b), then this appeal must be dismissed.

Language in some of our cases equates "claim" in Rule 54(b) with "claim" for purposes of res judicata, but as we observed in *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1367 (7th Cir. 1990), this equivalence cannot accommodate the many cases that permit separate appeals of claims and compulsory counterclaims. E.g., *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445, 452 (1956). It

follows that two "claims" may arise out of the same transaction for purposes of Rule 54(b), provided that the facts and theories are sufficiently distinct. *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1237 (7th Cir. 1990), remanded, 112 S. Ct. 40 (1991), after remand, 952 F.2d 965 (7th Cir. 1992). Two legal theories sufficiently distinct that they call for proof of substantially different facts may be separate "claims." *Stearns v. Consolidated Management, Inc.*, 747 F.2d 1105, 1108-09 (7th Cir. 1984); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 702-03 (7th Cir. 1984).

"Sufficiently" and "substantially" are hedges. Ideally the facts and theories separated for immediate appeal should not overlap with those retained; to the extent they do, the court of appeals is "deciding" claims still pending in the district court, and may have to cover the same ground when the district court acts on the residue. A combination of anticipation with overlap leads to wasteful duplication and increases the likelihood of conflict (or error). In disdaining bright lines and asking how much duplication is too much, we enter the zone of shadings traditionally committed to a district judge's discretion. So the Supreme Court emphasized in *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8-10 (1980).

Although the district judge in our case confused Rule 54(b) with § 1292(b), we do not believe that he abused his discretion in permitting an immediate appeal. American Family stated, in its memorandum concerning appellate jurisdiction, that "the dismissed Fair Housing Act claim, would, if it were viable, be subject to proof under a disparate impact formula, rather than under the 'intentional racial discrimination' test applicable to all the counts remaining in the district court." *Huntington and Bellwood v. Dwivedi*, 895 F.2d 1521, 1529-30 (7th Cir. 1990), show that this concession may have been imprudent, and American Family has tried to recant. But the parties shared this belief in the district court, and the

district judge may well have relied on its when deciding to enter judgment under Rule 54(b). Retraction thus comes too late—not only for purposes of this appeal, but also for the whole case. (Treating American Family's concession as binding on appeal but not back in the districa court would create precisely the wasted effort that Rule 54(b) is set against.) We therefore assume that plaintiffs' burden under Title VIII is lighter than their burden under the other legal theories. Different burdens may imply different "claims" even for purposes of preclusion. E.g., *Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *United States v. 89 Firearms*, 465 U.S. 354 (1984); cf. *United States v. Fonner*, 920 F.2d 1330, 1332-33 (7th Cir. 1990). Resolving the Title VIII issue in plaintiffs' favor implies that the other legal theories will fall away. If they prevail under Title VIII, they obtain all the relief they seek; if they lose at trial under Title VIII, they necessarily lose on all other theories; either way, there will not be duplicative appellate review. *Stearns* holds that this is enough, if barely, to justify treating a legal theory as a "claim" for purposes of Rule 54(b).

One additional jurisdictional problem needs attention. American Family insists that there is no case or controversy within the meaning of Article III because none of the plaintiffs has been unable to buy a house. This is strictly a constitutional argument, for the definition of "aggrieved person" in Title VIII, 42 U.S.C. § 3602(i), eliminates any prudential barriers to adjudication. *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 98-99 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-73 (1982). Congress amended the statute in 1988 to authorize suit by anyone who "believes that [he] will be injured by a discriminatory housing practice that is about to occur", § 3602(i)(2), and unless this statute is unconstitutional several of the plaintiffs (and the NAACP itself, as an organization whose members include many black persons in the housing market) have standing.

After *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), any litigant must show how he has been injured. Because this case was dismissed on the pleadings, "general factual allegations of injury resulting from the defendant's conduct may suffice". *Id.* at 2137. See also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2892 n.3 (1992). Paragraph 47 of the complaint implies that lack of insurance delayed one of the plaintiffs in closing on a house; delay in obtaining a valuable thing is an injury. So is paying a higher price for insurance or any other good or service. Plaintiffs cannot rest on their pleadings; once jurisdiction is contested (as it had been here) "each element [essential to justiciability] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof". *Lujan*, 112 S. Ct. at 2136. If they can prove the essential allegations of the complaint, however, plaintiffs have standing.

II

Any effort to use federal law to prescribe or penalize the behavior of insurers must reckon with the McCarran-Ferguson Act. Section 2(b) of this statute, 15 U.S.C. § 1012(b), provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance". American Family is engaged in the business of insurance; plaintiffs complain about how, and at what price, American Family writes (or declines to write) policies of insurance. The McCarran-Ferguson Act establishes a form of inverse preemption, letting state law prevail over general federal rules—those that do not "specifically relate[] to the business of insurance." Title VIII does not mention insurance and therefore cannot apply to its endeavors, American Family concludes. Plaintiffs rejoined at oral argument that racial discrimination is not insurance. The Fair Housing Act requires race-blind

practices in housing and related services; it does not tell anyone how to write insurance and therefore does not regulate the business of insurance, plaintiffs conclude.

Doubtless there is a difference between the business of insurance and the business of insurers. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987); *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982); *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 230 n.38 (1979). But it is not helpful to point to a practice forbidden by federal law (here, racial discrimination) and observe that this practice is not itself insurance. Discrimination is not insurance, but then neither is a conspiracy in restraint of trade. By such a maneuver we could declare that the antitrust laws apply with full rigor to the insurance industry; yet the main target of the McCarran-Ferguson Act was *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which applied the antitrust laws to insurance. Plaintiffs say that the Fair Housing Act tells American Family how to behave in deciding which risks it will accept, at what price, in its dealings with potential insureds; that is the core of insurance.

A stronger argument appears in plaintiffs' reply brief: that the McCarran-Ferguson Act does not apply to subsequently enacted civil rights statutes. This submission has the support of *Spirt v. Teachers Insurance and Annuity Ass'n*, 691 F.2d 1054, 1064-66 (2d Cir. 1982), vacated on other grounds, 463 U.S. 1223 (1983), on remand, 735 F.2d 23 (1984), and a few decisions by district courts. The second circuit wrote:

> We find, based on the historical context, the legislative history, and judicial interpretations of that history, that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had

> no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as "the business of insurance."

691 F.2d at 1065. Well *of course* Congress had no intention in the 1940s of curtailing the scope of laws yet to be enacted—indeed, inconceivable at the time. (After southern states regained representation in the Senate following the Civil War, no civil rights laws were enacted until 1957. See 71 Stat. 634). What Members of Congress may have "intended" in 1945, when it enacted a statute limited to the antitrust laws, and 1946, when it extended the McCarran-Ferguson Act to other federal laws, is not, however, the question. We must determine what Congress meant *by what it enacted*, not what Senators and Representatives said, thought, wished, or hoped. *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989). Cf. *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1147-49 & n.7 (1991); *American Hospital Ass'n v. NLRB*, 111 S. Ct. 1539, 1545-46 (1991). What Congress passed and the President signed—what the second circuit never quoted—is that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." "No Act of Congress" differs from "no act on the books in 1946" or "no act other than a civil rights statute."

"No Act of Congress" could not be more comprehensive. The McCarran-Ferguson Act creates a rule of construction applicable to all other federal laws, a "plain statement" approach. We had no difficulty applying the Act to subsequent legislation such as the Truth in Lending Act. *Lowe v. AARCO-American, Inc.*, 536 F.2d 1160 (7th Cir. 1976). The second circuit posed the wrong question when inquiring whether Congress meant to insulate the insurance business from civil rights laws. Congress did

not tie its hands; instead it prescribed the consequences of silence and specificity in other acts past and future. Federal laws that do not conflict with or supersede state rules always apply; federal laws inconsistent with state laws apply when Congress says so directly. Plaintiffs' problem is that Congress did not say so, even obliquely, in the Fair Housing Act.

Spirt and all of the district court decisions reaching a similar conclusion predate *Norris*, in which four Justices concluded that the McCarran-Ferguson Act applies to Title VII of the Civil Rights Act of 1964. 463 U.S. at 1099-1103 (Powell, J., joined by Burger, C.J., and Blackmun & Rehnquist, JJ., concurring in part and dissenting in part). The other five Justices found it unnecessary to address the issue. *Id.* at 1087 n.17. No Justice disagreed with Justice Powell, then or since. *Spirt* also predates *Pilot Life Insurance*, in which all nine Justices concluded that the McCarran-Ferguson Act applies to the Employee Retirement Income Security Act of 1974. Written a decade ago, *Spirt* might have looked to *Mitchum v. Foster*, 407 U.S. 225 (1972), which held that 42 U.S.C. § 1983 is specific enough to satisfy the Anti-Injunction Act, 28 U.S.C. § 2283. More recent cases have declined to extend the approach of *Mitchum* to create other exceptions to § 2283. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977); *Bolingbrook v. Citizens Utilities Co.*, 864 F.2d 481 (7th Cir. 1988); see also Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. Chi. L. Rev. 717 (1977). No Justice has suggested using *Mitchum* as a model approach to statutes other than § 2283. Perhaps the second circuit will take a new look at *Spirt* if the problem comes up again. No matter how our colleagues on the east coast would approach the subject today, however, we conclude that Congress should be taken at its word. The Fair Housing Act is an "Act of Congress" that does not "specifically relate[] to the business of insur-

ance". It therefore does not "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance".

Although American Family insists that this conclusion ends the case, it does not. What state law regulating the business of insurance does Title VIII "invalidate, impair, or supersede"? None that we could find. American Family points to two: Wis. Stat. § 101.22(2)(e), which forbids discrimination by casualty insurers on the basis of race, and Wis. Stat. § 628.34(3), which more generally interdicts "unfair discrimination" in the business of insurance. Although American Family insists that it is "of no importance" that "these statutes may not be inconsistent with the Fair Housing Act", this is hard to swallow. Literalism cuts both ways. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) (a preemption clause should be taken seriously, but such a clause also implies the absence of additional grounds of preemption). Having stood on the text to show that the McCarran-Ferguson Act governs the construction of the Fair Housing Act, American Family needs to show that the Fair Housing Act conflicts with state law. Duplication is not conflict.

Undoubtedly there is a sense in which any overlap between state and federal law upsets a balance struck by one of the two legislatures. *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2385-86 (1992). Wisconsin forbids "unfair discrimination" but, as we conclude in Part IV, did not create a private right of action to enforce this prohibition. Laws enforced only by administrative agencies with limited budgets are less potent than laws enforced by both agencies and private litigants. One could say that a federal rule increasing the probability that a state norm will be vindicated (or augmenting the damages assessed in the event of violation) conflicts with a decision by the state that remedies should be limited or rare. It is on reasoning of this sort that the Supreme Court does not allow states to forbid most con-

duct that is "arguably prohibited" by federal labor laws. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959). Cf. *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 228-29 (7th Cir. 1992).

Principles of labor law do not transfer to other subjects, however. *Garmon* and similar opinions rest on a conclusion that Congress occupied the field of labor relations, so that it remains only to decide which state laws regulate "labor relations" and which address broader subjects (such as criminal violence) that intersect with but do not displace federal rules. In the main, federal regulation of a subject—even thoroughgoing federal regulation—does not prevent states from adding remedies to the arsenal established by federal law. The McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict with (and so are preempted by) federal law are pertinent in deciding when federal rules "invalidate, impair, or supersede" state rules.

Consider nuclear power. National law regulates almost every nook and cranny of industries handling radioactive materials. Yet the Court held in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), that states may require firms engaged in this business to pay punitive damages for violating norms of state law duplicating those of federal law, even on the assumption that federal law sets a much lower cap on monetary liability. See also *English v. General Electric Co.*, 496 U.S. 72, 88-89 (1990). National law also regulates the competitive behavior of firms engaged in interstate commerce. The Court held in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that indirect purchasers may not recover under the antitrust laws because such recoveries would unduly complicate litigation and undermine the deterrent force of those laws. Nonetheless, the Court unanimously held in *California v. ARC America Corp.*, 490 U.S. 93 (1989), that states may require offenders to pay damages to indirect purchasers, on top of the treble damages federal law requires them to

pay to direct purchasers. Federal law regulates the advertising of cigarettes and expressly bars states from prescribing different or additional disclosures; nonetheless, states may award damages for fraud in selling this product. *Cipollone*, 112 S. Ct. at 2623-24. The catalog may be extended at will. E.g., *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) (medical safety); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 502-05 (7th Cir. 1989) (tender offers); *Air Line Pilots Ass'n v. UAL Corp.*, 874 F.2d 439, 446-47 (7th Cir. 1989) (interaction of labor and corporate law).

Considerations of this kind led the fourth circuit to hold in *Mackey* that application of the Fair Housing Act to insurance would not impair or supersede any state law, although North Carolina, like Wisconsin, forbids discriminatory rates in the insurance business. 724 F.2d at 421 nn. 1 & 2. (*Mackey* went on to hold that the Fair Housing Act does not apply to property insurance, a subject to which we return.) The only obstacle to joining that conclusion is our opinion in *Lowe*. After holding that the rule of construction in the McCarran-Ferguson Act applies to the Truth in Lending Act, and observing that Illinois required insurance brokers and premium finance companies to make the same disclosures as the Truth in Lending Act did, we wrapped up: "Since Illinois has regulated this aspect of the 'business of insurance' in the same manner as would the Truth in Lending Act, there is no compelling reason to restrict the full sway of the McCarran Act in this case." 536 F.2d at 1162. Without further explanation, *Lowe* affirmed a judgment dismissing a suit filed under the Truth in Lending Act.

Lowe's unstated premise is that a federal statute duplicating the terms of state law "invalidate[s], impair[s], or supersede[s]" state law. *Lowe* did not explain why and cited no authority. This omission has opened *Lowe* to criticism by the fifth circuit, *Cochran v. Paco, Inc.*, 606

F.2d 460, 466 (5th Cir. 1979). Cases such as *Silkwood* and *ARC America* decided in the 16 years since *Lowe* show that state and federal rules that are substantively identical but differ in penalty do not conflict with or displace each other. To the extent *Lowe* holds the contrary, it is overruled.

Nothing in this conclusion permits federal law to displace states' choices about the proper conduct of the business of insurance. If Wisconsin wants to authorize redlining, it need only say so; if it does, any challenge to that practice under the auspices of the Fair Housing Act becomes untenable. American Family has not drawn to our attention, however, any law, regulation, or decision in Wisconsin requiring redlining, condoning that practice, committing to insurers all decisions about redlining, or holding that redlining with discriminatory intent (or disparate impact) does not violate state law. Cf. *FTC v. Ticor Title Insurance Co.*, 112 S. Ct. 2169 (1992). No official of Wisconsin has appeared in this litigation to say that a federal remedy under the Fair Housing Act would frustrate any state policy. Although the McCarran-Ferguson Act gives states the final word on the regulation of insurance unless Congress specifically overrides their choices, Wisconsin's word is consistent with the Fair Housing Act.

III

According to the plaintiffs, three sections of the Fair Housing Act address insurance sold (or withheld) in connection with the purchase of a dwelling: 42 U.S.C. §§ 3604(a), 3604(b), and 3605. Section 3605 requires the least discussion. It provides:

> (a) It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction,

because of race, color, religion, sex, handicap, familial status, or national origin.

(b) As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance—

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

It would strain language past the breaking point to treat property or casualty insurance as "financial assistance"—let alone as assistance "for purchasing . . . a dwelling". Insurers do not subsidize their customers or act as channels through which public agencies extend subsidies. They do not "assist" customers even in the colloquial sense that loans are "assistance" (a lender advances cash, with repayment deferred). Payment runs from the customer to the insurer. Insurance is no more "financial assistance" than a loaf of bread purchased at retail price in a supermarket is "food assistance" or a bottle of aspirin bought from a druggist is "medical assistance."

Section 3604 makes it unlawful:

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, *or in the provision of services* or facilities *in con-*

> *nection therewith*, because of race, color, sex, familial status, or national origin.

Plaintiffs rely on the portions of these sections that we have italicized. They contend that by refusing to write policies (or setting a price too dear) an insurer "make[s a dwelling] unavailable" to the potential buyer. Lenders require their borrowers to secure property insurance. No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable. Cf. *Cartwright v. American Savings & Loan Ass'n*, 880 F.2d 912 (7th Cir. 1989). Plaintiffs also submit that property insurance is a "service" rendered "in connection" with the sale of the dwelling. If the world of commerce is divided between "goods" and "services," then insurers supply a "service." "[I]n connection" may be read broadly, and should be (plaintiffs contend) to carry out the national goal of removing obstacles to minorities' ownership of housing. There you have it.

Nothing in the text of the statute permits us to reject these proposed readings. The Fair Housing Act does not define key terms such as "service" and "make unavailable". By writing its statute in the passive voice—banning an outcome while not saying *who* the actor is, or *how* such actors bring about the forbidden consequence—Congress created ambiguity.

Although § 3604 could bear the reading plaintiffs propose, it need not. It does not mention insurers or forbidden devices. Plaintiffs would like us to embrace the "remedial purpose" of the statute. Title VIII indeed is designed to root out racial discrimination in the housing market. Whether it reaches insurers, however, is not something a general reference to purpose discloses. One can always do "more" in pursuit of a goal, but statutes have limits. You cannot discover how far a statute goes by observing the direction in which it points. "Finding the meaning of a statute is more like calculating a vector

(with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone). Cf. *Walton v. United States Consumers Club, Inc.*, 786 F.2d 303, 310-11 (7th Cir. 1986); *Mercado v. Calumet Federal Savings & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985)." *In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987). See also *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

After denying that "remedial purpose" alone extends the statute to insurance, the fourth circuit in *Mackey* gave several reasons why it believed that § 3604 does not apply. The first is that § 3605 shows that § 3604 must be read narrowly. "If § 804 [§ 3604] was designed to reach every discriminatory act that might conceivably affect the availability of housing, § 805's specific prohibition of discrimination in the provision of financing would have been superfluous." 724 F.2d at 423. The court's unstated assumption is that statutes never overlap. Section 3605 then shows that § 3604 does not cover lending, and by implication does not cover much at all. Yet why should we suppose that sections of a statute do not overlap? See *United States v. Naftalin*, 441 U.S. 768, 778 (1979) ("that there may be some overlap is neither unusual nor unfortunate."). Conveying meaning to diverse interpreters for an uncertain future is a difficult business. A wise drafter may state a principle in one section and list some applications of that principle in another, to make pellucid what ought to be apparent but which some judges (and many lay persons) will miss unless spelled out. Using the instance to restrict the principle would gum up the process of communication, inverting every effort to clarify.

As a second reason for treating § 3604 as inapplicable to insurance, *Mackey* observed that "[t]he insurance industry has traditionally classified risks. If insurance premiums are to remain at reasonable levels for most householders, some insurers must be permitted to reject risks

which are perceived to be excessively high, while charging higher premiums on some risks than upon others." 724 F.2d at 423. If the question were whether to subject redlining by insurers to evaluation under the disparate impact paradigm, this consideration might be important. As we suggested at the outset, classification of risks is important to insurance, and assigning higher rates to greater risks differs from assigning rates by race. Nothing in the nature of insurance implies that hazard insurers need to engage in disparate treatment, to draw lines on the basis of race rather than risk. The fourth circuit could have said much the same thing about lenders as it said about insurers. A lender must evaluate the risk that the borrower will not repay, and higher probability of nonpayment implies a higher rate of interest (or a lower probability of extending credit). Title VIII indisputably applies to lenders, and it is difficult to see risk classification as a principled ground to exclude insurers.

Mackey also stressed the omission from both § 3604 and its legislative history of any reference to insurance. Because § 3604 uses the passive voice, however, it omits reference to any person. Insurers, escrow agents, title searchers, and so on are treated alike. The fourth circuit ultimately concluded that "service" in § 3604 means no more than "garbage collection and other services of the kind usually provided by municipalities", 724 F.2d at 424, but Congress did not mention either garbage collectors or municipalities in § 3604. *Selective* omission might be telling, but the universal omission that accompanies passive construction does not distinguish insurers from others. We once suggested in passing, *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984), that "service" in § 3604 means "services generally provided by governmental units," but the subject was not before us—and the suggestion that § 3604 is *limited* to governments is hard to reconcile with another plain-statement principle requiring Congress to be

especially clear if it wants to regulate the conduct of state and local governments. E.g., *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2406 (1991); *Dellmuth v. Muth*, 491 U.S. 223 (1989). A statute that does not mention state governments applies exclusively to private actors. So it is hard to understand § 3604 as restricted to garbage collection and like services. See also *Clifton Terrace Associates, Ltd. v. United Technologies Corp.*, 929 F.2d 714 (D.C. Cir. 1991) ("service" in § 3604 means services in connection with the acquisition of housing, not its maintenance; § 3604 therefore does not apply to elevator repair services).

Silence in the legislative history could imply that Members of Congress did not anticipate that the law would apply to insurers. Silence equally could imply that the debate was about the principle of non-discrimination, leaving details to the future. The backward phraseology of § 3604 suggests the latter possibility. What was in the heads of the legislators is not, however, the measure of their enactment. Only the statute, and not the debates, is part of the United States Code. Persuasive evidence that Congress embedded terms of art in the text might lead us to confine its scope, *Continental Can Co. v. Chicago Truck Drivers Pension Fund*, 916 F.2d 1154 (7th Cir. 1990), but what did not happen during the debates hardly shows that any word in the enacted text carries a special meaning.

In 1980 the silence was broken. A district court concluded that the Fair Housing Act covers property insurers. *Dunn v. Midwestern Indemnity Mid-American Fire & Casualty Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979). Some Members of Congress sought to amend Title VIII to "clarify" that *Dunn* correctly understood its scope. The effort was beaten back. See *Mackey*, 724 F.2d at 423-24 (summarizing these events). The fourth circuit inferred that Congress disapproved of *Dunn*. That conclusion is unwarranted. Proposed legislation can fail for many rea-

sons. Some Members of Congress may oppose the proposal on the merits; others may think it unnecessary and therefore not worth the political capital needed to write the "clarification" into the statute over opposition; still others may be indifferent, or seek to use the bill as a vehicle for some unrelated change. Congress may run out of time, as a noncontroversial bill sits in a queue while a contentious proposal is debated. No surprise, therefore, that the Supreme Court repeatedly reminds us that unsuccessful proposals to amend a law, in the years following its passage, carry no significance. E.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989). See also *United States v. Marshall*, 908 F.2d 1312, 1318-19 (7th Cir. 1990) (in banc), affirmed under the name *Chapman v. United States*, 111 S. Ct. 1919, 1927 n.4 (1991). Were it otherwise, one House of Congress could change the meaning of a law by refusing to approve a change in the text. Yet Congress may change the law only by bicameral action, *INS v. Chadha*, 462 U.S. 919 (1983), which implies that the refusal of one chamber to assent to a proposed amendment cannot alter the meaning of the law on which both chambers agreed in prior years.

By parallel reasoning, we dispatch American Family's argument that legislative failure to overturn *Mackey* is significant. Interest groups alert Congress to many judicial decisions, and the legislature frequently alters the law to countermand opinions that do not find favor in today's political climate. During the last quarter century, Congress has interred an average of 15 opinions per year, about two-thirds of these opinions by the inferior courts. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 338 (1991). Courts of appeals and district courts issue tens of thousands of opinions yearly, however, so an opinion has to stir up a hornets' nest to get on the agenda. Most of the time, Congress waits to see whether a higher court will reach a different conclusion. *Mackey* appeared on the

agenda, but some Members of Congress opposed the proposal to change Title VIII. Members of Congress expressed conflicting views, but Congress as an institution took a pass. That decision carries no significance.

Congress has not been inactive since *Mackey*, however. In 1988 it enacted amendments to the Fair Housing Act, authorizing the Department of Housing and Urban Development to "make rules . . . to carry out this subchapter." 42 U.S.C. § 3614a. Congress gave the Executive Branch this power with knowledge that since 1978 a succession of Secretaries have believed that "[i]nsurance redlining, by denying or impeding coverage[,] makes mortgage money unavailable, rendering dwellings 'unavailable' as effectively as the denial of financial assistance on other grounds". Memorandum by the General Counsel of HUD, quoted in *Dunn*, 472 F. Supp. at 1109. The Secretary deployed this new rulemaking power in the predictable way, issuing regulations that include, among the conduct prohibited by § 3604: "Refusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race". 24 C.F.R. § 100.70 (d)(4). The United States has filed a brief as *amicus curiae* to support the plaintiffs' position in this case.

Section 3604 is sufficiently pliable that its text can bear the Secretary's construction. Courts should respect a plausible construction by an agency to which Congress has delegated the power to make substantive rules. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534-36 (1991). We can imagine the response that courts do not defer to administrative constructions when judges, rather than administrators, hold the power of enforcement. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). Just as Congress authorized private litigation to enforce the Migrant and Seasonal Agricultural Worker Protection Act, the subject of *Adams Fruit*, so the Fair Housing Act is enforced by the courts

at the instance of private persons believing themselves wronged.

Among the amendments in 1988, however, was a provision for administrative enforcement paralleling judicial enforcement. 42 U.S.C. §§ 3610-12. The Secretary's regulations would receive deference in an action to enforce HUD's administrative decision. It would be weird to say that Title VIII applies to insurers on judicial review of administrative actions but not when the litigation begins in district court. Long before *Adams Fruit*, indeed long before the Secretary had the power to issue regulations and adjudicate complaints under Title VIII, the Supreme Court declared that the Secretary's views about the meaning of that statute are entitled to "great weight". *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Gladstone*, 441 U.S. at 107.

Events have bypassed *Mackey*. We have expressed doubt about the interpretive methods used in that opinion. No matter how a court should have understood the Fair Housing Act in 1984, however, the question today is whether the Secretary's regulations are tenable. They are. Section 3604 applies to discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant.

IV

Plaintiffs contend that redlining violates state law in two ways. First, they believe, redlining entails racial discrimination forbidden by Wis. Stat. § 101.22(2)(e). Second, they contend, redlining is an "unfair" practice that offends several provisions of the Insurance Code. American Family concedes that plaintiffs are entitled to enforce § 101.22(2)(e) in private litigation but denies that statutes and regulations speaking more generally about "unfair" practices create private rights of action. The district court agreed with this submission and dismissed the complaint to the extent it relied on Wis. Stat. §§ 625.11(1)

and 628.34(3), and Wis. Adm. Code INS 6.68. Our review is plenary. *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991).

Section 625.11(1) forbids "unfair discrimination" in the setting of rates but does not specify what unfair discrimination consists in. Section 628.34(3) bans differentials in premiums and coverages unless based on "classifications related to the nature and the degree of the risk covered and the expenses involved". Regulation INS 6.68 adds a bit of specificity to these open-ended statutes. Plaintiffs rely particularly on INS 6.68(3)(a), which identifies the following as "unfairly discriminatory" for purposes of the insurance statutes:

> Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, canceling or limiting the amount of insurance coverage on a property or casualty risk because of the geographic location of the risk, unless:
>
> 1. The refusal, cancellation or limitation is for a business purpose which is not a mere pretext for unfair discrimination, or
>
> 2. The refusal, cancellation or limitation is required by law or regulatory mandate.

Redlining is a distinction based on the "geographic location of the risk" and hence unlawful in Wisconsin as "unfairly discriminatory" unless "for a business purpose which is not a mere pretext for unfair discrimination".

Neither of these statutes, nor regulation INS 6.68, specifies private litigation or provides a remedy in damages. Each regulates general business practices and leaves much to the discretion of whoever must determine what is "unfair" or "for a business purpose". Like charges to a federal agency to identify the "public interest, convenience, and necessity," these rules read more like descriptions of

an agency's turf than like individual rights to be enforced in litigation.

No court of Wisconsin has permitted anyone to enforce provisions of this kind in the insurance laws through private litigation. Plaintiffs observe that many state cases say that a remedy accompanies every right, e.g., *Urwan v. Northwestern National Life Insurance Co.*, 125 Wis. 349, 103 N.W. 1102 (1905), and that *Yanta v. Montgomery Ward & Co.*, 66 Wis. 2d 53, 224 N.W.2d 389 (1974), allowed a victim of employment discrimination to obtain a remedy, back pay, not mentioned in the statute creating the right of action. Our concern, though, is not whether there is *some* remedy for violations of state law—for Wisconsin maintains a substantial administrative apparatus regulating the conduct of insurers—or whether the statutes provide one measure of damages rather than another. It is whether courts, rather than the regulators, are the right institutions to identify "unfair discrimination" and "business purpose" in this market.

Kranzush v. Badger State Mutual Casualty Co., 103 Wis. 2d 56, 307 N.W.2d 256, 268-70 (1981), persuades us that Wisconsin wants such contentions submitted to administrators rather than judges. Kranzush complained that, even though its insured obviously was negligent and had to compensate the victim of an auto accident, an insurance company stalled until the victim died; such manipulation, the administrator of the estate contended, violated Wis. Adm. Code INS 6.11(3)(a)4, which makes it an "unfair practice" for an insurer to fail "to attempt in good faith to effectuate fair and equitable settlement of claims submitted in which liability has become reasonably clear." The Supreme Court of Wisconsin held that enforcement of administrative rules defining unfair practices is for administrative officials, which can revoke an insurer's license or impose other penalties. Wis. Stat. § 601.64(3)(c) and (4) set out penalties for transgressions against insurance statutes and rules; damages in private actions are not among them. Although *Kran-*

zush mentioned that a separate provision for administrative remedies in INS 6.11 fortified the conclusion that the administrative route was exclusive, 103 Wis. 2d at 80, 307 N.W.2d at 268, the court also emphasized that the rule defined unfair practices, a subject the justices thought best handled by the Commissioner of Insurance and the staff of that office.

Perhaps the Supreme Court of Wisconsin ultimately will conclude that the specification of an administrative remedy in INS 6.11 distinguishes that section from INS 6.68. Extensions of state law are best left to state courts. This is a case about racial discrimination, and plaintiffs will have ample opportunity to prove their claims under both state and federal law.

V

Because this opinion overrules *Lowe* to the extent that *Lowe* holds that the McCarran-Ferguson Act prevents the application of federal laws duplicating state rules, and because it conflicts with both the second circuit's views in *Spirt* and the fourth circuit's holding in *Mackey*, it was circulated before release to all judges in active service. See Circuit Rule 40(f). No judge requested a hearing in banc.

The judgment of the district court is affirmed to the extent it holds that there is no private right of action to enforce Wis. Stat. §§ 625.11(1) and 628.34(3), and Wis. Adm. Code INS 6.68. The judgment is reversed to the extent it holds that the Fair Housing Act is inapplicable to property and casualty insurance written or withheld in connection with the purchase of real estate. The case is remanded for proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil No. 90-C-0759

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE and its Milwaukee Branch (NAACP), CELESTINE LINDSEY, DOROTHY LISTENBEE, JAMES MILNER, DIANNE PRATT, MARVIN PRATT, SIMON WILLIAMS, BEVERLY WILLIAMS, and LOIS WOODS, individually and as representatives of a class of all similarly situated persons, *Plaintiffs*,

vs.

AMERICAN FAMILY MUTUAL INSURANCE CO., and JOHN DOES 1 through 20, and XYZ CORPORATION, *Defendants.*

TRANSCRIPT OF HEARING ON DEFENDANT'S MOTIONS TO DISMISS AND FOR RULE 11 SANCTIONS

Record made in the above-entitled matter before the Honorable J. P. Stadtmueller, Judge of said Court, on December 11, 1990, commencing at 1:35 p.m.

* * * *

[36] THE COURT: Thank you. Well, based upon my review of the entirety of this issue, let me begin with a few general observations. First of all, I appreciate counsel's efforts to bring to the court the relevant authority that you believe are [37] instructive and perhaps controlling with regard to this court's disposition of this motion.

On the one hand I have considerable personal empathy and sympathy for those who find themselves in the shoes of the plaintiffs, unable to secure what not only the Fair Housing Act but these other statutory enactments have allowed them or created vehicles for them to insure that

these valuable rights that Congress has created are rightfully delivered.

But on the other hand to follow up on a comment that Mr. Shriner made from the *Bethlehem Steel* case, so also it is not entrusted to the courts to enact legislation where Congress has either shirked or otherwise erred in its responsibilities. And with regard to the matter of the Fair Housing Act claim, I am constrained in the factual setting that has been presented to the court in the pleadings as well as the comments that both sides have drawn upon in the legislative history as well as what I believe to be the most significant case in this area, namely, *Mackey versus Nationwide Insurance Company*, to grant the defendant's motion to dismiss Count One.

I do so because the United States Congress on more than one occasion has had an opportunity to amend the statute subsequent to *Mackey*. In fact, amendments were proposed again in 1987. And Congress in its own inimitable fashion chose to duck the issue for lack of a better description and [38] chose not to include it in the final legislation that was enacted.

Similarly with regard to the matter of the court giving due deference to these HUD regulations that have been recently promulgated, the regulations may be well and good and well-intended, but the fact of the existence of the regulations without any statutory authority specifically authorizing those types of regulations I find totally undermines any reliance on those regulations in the context of this particular case, particularly against the backdrop of senators from both sides of the aisle, and I make reference to Senator Heflin and Hatch having chastised the Department of Housing and Urban Development back in 1980 for their attempts to administratively work into the regulatory scheme matters that relate to the matter of insurance coverage.

And so there is considerable amount of undercurrent that exists with regard to plaintiffs true reliance on some of these matters that while they have been certainly de-

bated in the halls of the legislature and through committee, the reality is Congress in its wisdom has seen not to enact legislation specifically relating to insurance.

I do not find a great deal of credence to be drawn from the comment of Judge Bauer in the *Southend* case. As defendants correctly point out, no authority was cited in the footnote for reference to insurance "redlining." In point of [39] fact, much of what has been developed in this area was quite available if the court seriously wanted to draw upon that analogy in its ultimate decision in the *Southend* case. And I dare say it's a rather open question whether it was wise to have included insurance "redlining" when it came to the Fair Housing Act. It may be applicable under one or more of the other claims that remain viable, but I do not find it at all within the ambit of section 34 or—strike that, 34 or 35 of the Fair Housing Act; and, accordingly, I am compelled to grant a dismissal as to Count One.

I'm going to ultimately deal with this in a manner that will allow plaintiffs to immediately take this issue up to the Seventh Circuit if they so elect. This case is not going to be resolved in the near term. In fact, we'll take up the matter of scheduling at the conclusion of my ruling with regard to the insurance claim.

With reference to the insurance claim, the issue I think is a little more close than it is with regard to the matter of the Fair Housing Act claims. And the reason that I say so is that as counsel are aware, and I think at some point one or more of you may have cited this by way of analogy in your written submissions, there's disagreement even among myself and my fellow judges with regard to a private right of action under the Wisconsin Fair Employment Act in the federal courts.

I believe the issue is still up on appeal in the Seventh [40] Circuit. I'm not aware that it has been resolved at the appellate level; and I think truly that there is some argument, although very limited, that one could advance to suggest that plaintiffs have a cause of action under the Wisconsin insurance regulatory system.

However, I don't believe that that slight authority by way of analogy sufficiently overcomes my judicial conservatism in recognizing, for example, that had the Wisconsin legislature wanted to create a private right of action with regard to the matter of redress under the Wisconsin insurance regulatory scheme, that they would not have so much as said so. For example, as the legislature created a direct right of action against an insurance company in connection with a tort or other action that would allow an insured or a third party to proceed directly against an insurance carrier.

The same holds true in my view by way of analogy with regard to what plaintiffs perceive to be a private right of action in the context of this factual setting presented in this case. That is to say, had the Wisconsin legislature at the time or subsequently by way of amendment chosen to grant plaintiffs or those similarly situated with such right, they certainly could have chosen to do so.

And in essence what is really being sought here is a judicial imprimatur or fiat with regard to whether or not the causes of action stated in the first claim and the fifth claim [41] survive what has been enacted by the legislatures both in Wisconsin and in the Congress. And I am compelled, albeit reluctantly, to conclude that the legislature has not granted the plaintiffs the vehicle by which they have presented their claims in the first and fifth causes of action.

Having made those findings, I'm going to direct that my clerk enter a judgment in this case pursuant to Rule 54 (b) of the Federal Rules and that that judgment run in favor of the defendant as to both the first and fifth causes of action. And that judgment be a final judgment since I am at the same time expressly determining pursuant to Rule 54(b) that there is no just reason for the delay of entry of judgment as to the first and fifth causes of action until final determination of the balance of the claims set forth in the complaint.

* * * *

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 90-C-759

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiffs,

vs.

AMERICAN FAMILY MUTUAL INSURANCE CO.,
Defendant.

ORDER

[Filed Dec. 17, 1990]

This matter came on for hearing on December 11, 1990 upon the defendant's motions to dismiss and for Rule 11 sanctions. The plaintiffs appeared by john powell, William H. Lynch, James H. Hall, Jr., and Curry First. The defendant appeared by Thomas L. Shriner, Jr., Richard M. Esenberg, and Robert C. Burrell. Amicus curiae United States of America appeared, by special leave of the Court, by Joseph D. Rich and Conrad Schneider. Having heard the oral arguments of counsel and considered the briefs of the parties and amici curiae, and for the reasons stated on the record in open court, the Court entered the following orders:

1. The defendant's motion to dismiss the first and fifth claims of the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state claims upon which relief can be granted, is GRANTED.

2. Upon its own motion, the Court, pursuant to Fed. R. Civ. P. 54(b), expressly DIRECTS the Clerk to enter a final judgment dismissing the first and fifth claims of the complaint, having expressly determined that there is no just reason for delay in the entry of the judgment.

3. The defendant's motion for an order, pursuant to Rule 11, Fed. R. Civ. P., requiring the plaintiffs to pay the defendant its costs incurred in bringing the motion to dismiss the fifth claim is DENIED.

Done at Milwaukee, Wisconsin this 17th day of December, 1990.

BY THE COURT:

/s/ J. P. Stadtmueller
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 7, 1992

HON. JOHN L. COFFEY, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. THOMAS E. FAIRCHILD, Senior Circuit Judge

No. 91-1176

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiffs-Appellants,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 90-C-759—J.P. Stadtmueller, *Judge.*

ORDER

Defendant-Appellee filed a petition for rehearing and suggestion of rehearing en banc on November 3, 1992. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

No. 92-1455

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Petitioner,

—v.—

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

This case comes before the Court on a motion to dismiss. Accordingly, the facts alleged by respondents in this action -- the NAACP and its Milwaukee branch, Celestine Lindsey, Dorothy Listenbee, James Milner, Dianne Pratt, Marvin Pratt, Simon Williams, Beverly Williams, and Lois Woods and a class of similarly situated persons -- must be taken as true.

In their complaint, respondents alleged that American Family employs a variety of practices in order to avoid doing business with homeowners on the basis of race and the geographical location of their home and to discourage these homeowners from seeking insurance from American Family. Specifically, respondents contend in their complaint that American Family ignores the individual characteristics of property owners and their properties when making decisions about homeowner's insurance, and instead discriminates by relying upon gross generalizations and racial stereotypes imputed to all property owners within a given geographical territory.

In response to these practices and policies, more commonly defined as insurance "redlining," respondents stated five causes of action under federal and state law: (1) the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3604 *et seq.*; (2) the Civil Rights Act of 1870, 42 U.S.C. §1981; (3) the Civil Rights Act of 1866, 42 U.S.C. §1982; (4) the State of Wisconsin Fair Housing Act, Wis Stats. §101.22(2)(e); and (5) the State of Wisconsin Insurance Code, Wis. Stats. §§625.11(1) and 628.34(3) and Wis. Admin. Code §Ins. 6.68.

American Family moved to dismiss under Fed.R.Civ. P. 12(b) for failure to state a claim upon which relief can be granted for only two of respondents' five claims, the federal Fair Housing Act and state insurance law claims. The district court granted American Family's

motion in a ruling from the bench on December 17, 1990. Pet.App. at 28a-33a. The court also directed the entry of a final judgment under Fed.R.Civ.P. 54(b). Pet.App. at 31a. Respondents appealed this ruling to the United States Court of Appeals for the Seventh Circuit.

The Seventh Circuit reversed the district court's ruling on whether respondents had a claim under the Fair Housing Act, finding that regulations promulgated by the Department of Housing and Urban Development correctly interpreted the Act as prohibiting insurance "redlining," and that the application of the Fair Housing Act is not prevented by the McCarran-Ferguson Act, 15 U.S.C. §§1011 *et seq.*[1] Pet.App. at 9a-24a.

SUMMARY OF ARGUMENT

There is less dispute about the law that governs this case than petitioner suggests. There is no question that petitioner is prohibited by state law from discriminating on the basis of race in the provision of homeowner's insurance, so the legal mandate to petitioner is clear. Indeed, petitioner itself has conceded throughout this litigation that racial discrimination in the provision of insurance is indefensible. Nevertheless, petitioner would like this Court to decide whether the federal Fair Housing Act also prohibits such discrimination. A decision by this Court is not, however, warranted at this time.

There is no meaningful split in the circuits, despite petitioner's claims to the contrary. The agency charged with interpreting the Fair Housing Act has duly promulgated regulations on this exact point, and only one cir-

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[1] The Seventh Circuit affirmed the lower court's decision to dismiss the state insurance code claims. Pet.App. at 24a-27a.

cuit court has as yet had the opportunity to review the regulations. That decision, by the Seventh Circuit, was fully consistent with congressional intent and correctly applied this Court's precedents to conclude that deference to the agency's regulations was appropriate. At the very least, other circuit courts should be given the opportunity to consider the regulations before this Court reaches out to review the agency's determination.

In addition, the Seventh Circuit's ruling on the McCarran-Ferguson Act is nothing more than a straightforward application of the law on preemption, and thus does not justify plenary review by the Court. Furthermore, the Seventh Circuit's view that the McCarran-Ferguson Act is not a barrier to relief in this case is consistent with every other lower court ruling on the subject. In asking this Court to review this decision simply because the analysis -- but not the result -- differed from another circuit, petitioner seeks the sort of advisory opinion that this Court has historically refused to provide.

Finally, the decision below is correct on the merits. Its analysis of both the Fair Housing Act and the McCarran-Ferguson Act is well reasoned and well supported by this Court's case law. Moreover, as petitioner has conceded: "'Redlining,' whether practiced by a financial institution, an insurance company, or a governmental body, is reprehensible." Petition for a Writ of *Certiorari* at 5. This concession belies the claim of petitioner and its supporting *amici* that the Seventh Circuit's decision will result in industry-wide confusion.

REASONS FOR DENYING THE WRIT

I. IT IS PREMATURE FOR THIS COURT TO RESOLVE THE FAIR HOUSING ACT ISSUE RAISED BY PETITIONER, SINCE THE SEVENTH CIRCUIT IS THE ONLY CIRCUIT COURT THAT HAS YET REVIEWED THE RECENTLY PROMULGATED AGENCY REGULATIONS THAT PETITIONER CHALLENGES, THE SEVENTH CIRCUIT DECISION CORRECTLY INTERPRETED CONGRESSIONAL INTENT, AND IN ANY CASE THE MANDATE TO PETITIONER NOT TO DISCRIMINATE IS UNDISPUTED

A. There Is No Meaningful Conflict Among The Circuits That Justifies Plenary Review At This Time

There is not nearly as much at stake for petitioner at this atage of the proceedings as petitioner suggests. There is no question that petitioner is prohibited by law from discriminating on the basis of race in its provision of homeowner's property and hazard insurance. Petitioner, in fact, concedes that Wisconsin state law "provides a comprehensive regulatory structure that unequivocally prohibits racial discrimination by all insurance companies doing business in the state." Pet.Cert. at 24-25. Moreover, petitioner has maintained throughout this litigation that it believes racial discrimination in the provision of insurance to be wrong, and it has strenuously denied that it discriminates on the basis of race.

Accordingly, this petition has a certain abstract legal quality to it. As a matter of practice, petitioner does not claim the right to discriminate on the basis of race in its provision of insurance, and would not claim that it did even if the federal Fair Housing Act were declared inapplicable. As a matter of law, petitioner would be barred from discriminating by state statute even if this Court ruled in its favor. Those state claims, and other federal

claims,[2] remain to be tried regardless of the outcome of this petition. In fact, discovery and other preparation for the trial proceeds even while this petition is pending.

Petitioner nevertheless asks this Court to step in now and review the Department of Housing and Urban Development (H.U.D.)'s regulations holding that §3604 of the Fair Housing Act prohibits racial discrimination in the provision of homeowner's property and hazard insurance. Petitioner's request is misplaced for several reasons: (1) there is in fact no split among the circuits, despite petitioner's argument to the contrary; (2) the Seventh Circuit's decision correctly interpreted Congress' intent in enacting the Fair Housing Act; and (3) the regulations at issue are fairly recent, and lower federal courts should be given additional time to review them before this Court rules on them.

First, the purported conflict between the Seventh and Fourth Circuits that petitioner raises is a specious one. The Seventh Circuit's decision holding that insurance redlining is prohibited by §3604 of the Fair Housing Act, 42 U.S.C. §3604, is the *only* circuit court decision decided after H.U.D. promulgated regulations that included insurance redlining as conduct prohibited by §3604. By contrast, the Fourth Circuit decision that petitioner relies on, *Mackey v. Nationwide Insurance Cos.*, 724 F.2d 419 (4th Cir. 1984), was decided nine years ago in the absence of any regulations from H.U.D. interpreting the Act on this point. *Mackey* was also decided prior to Congress enacting a statute that expressly authorized

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[2] Respondents have also raised claims that petitioner's racial discrimination in the provision of homeowner's insurance violates the Civil Rights Act of 1870, 42 U.S.C. §1981, and the Civil Rights Act of 1866, 42 U.S.C. §1982. Those claims are not at issue in this petition. Indeed, petitioner did not raise affirmative defenses to respondents' §§1981 and 1982 claims in its answer in this case; the §§1981 and 1982 claims were not at issue in the district court, and were not involved in the Seventh Circuit appeal.

H.U.D. to promulgate regulations interpreting §3604 of the Act. *See* 42 U.S.C. §3614a (1988).

As this Court's precedents make clear, the adoption of duly promulgated regulations on point changes the legal analysis that a reviewing court is bound to apply. *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This is because of the well-established rule that regulations validly promulgated by agencies pursuant to congressional authority have the full force and effect of statutory law. *See Yiatchos v. Yiatchos*, 376 U.S. 306 (1964). In particular, H.U.D. regulations interpreting the Fair Housing Act "command considerable deference" on review. *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 107 (1979). The Fourth Circuit, ruling in 1984, was of course not able to accord the agency's regulations any deference at all.[3]

Petitioner ignores the effect of these new regulations and simply contends that "[n]ow, two courts of appeals have addressed the applicability of the Fair Housing Act to insurance companies and reached opposite results." Pet.Cert. at 12. This mischaracterizes the cases and attempts to create a conflict among the circuits where none exists. The Seventh Circuit, in its decision in this case, correctly explained why there is in fact no conflict between its holding and the Fourth Circuit's: "Events

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[3] The obsolescence of the Fourth Circuit's analysis, now that H.U.D. has duly promulgated regulations on point, is apparent even from petitioner's characterization of the *Mackey* decision. Petitioner contends that the Fourth Circuit reached its determination that Congress did not intend the Fair Housing Act to apply to discrimination in insurance "as much on common sense as on any rule of statutory construction." Pet.Cert. at 14. Under well-established principles of administrative law, a court reviewing agency regulations may not simply impose its own "common-sense" reading of the statute, but must instead accord the agency's expert interpretation appropriate deference. *See Chevron*, 467 U.S. at 866 ("Federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do.")

have bypassed *Mackey* . . . . No matter how a court should have understood the Fair Housing Act in 1984 . . . . the question today is whether the Secretary's regulations are tenable. They are." Pet.App. at 24a. For these reasons, the conflict between circuits that petitioner purports to find simply does not exist.

Second, petitioner is mistaken in its contention that "the Fourth Circuit, not the Seventh Circuit, correctly construed the Fair Housing Act." Pet.Cert. at 13. The Seventh Circuit correctly interpreted congressional intent when it held that §3604 of the Fair Housing Act should properly be held to apply to discrimination in homeowner's property and hazard insurance. The plain language and legislative intent of §3604 make clear that the provision must prohibit racial discrimination in insurance. And, indeed, the two reported decisions on this issue other than *Mackey* have so held. *See McDiarmid v. Economy Fire and Casualty Co.*, 604 F.Supp. 105 (S.D. Ohio 1984); *Dunn v. Midwestern Indemnity Mid-American Fire and Casualty Co.*, 472 F.Supp. 1106, 1109 (S.D. Ohio 1979).

The plain language of §3604 demonstrates Congress' intent that racial discrimination in the provision of homeowner's property and hazard insurance must be covered. Section §3604 makes it illegal to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race . . . ." 42 U.S.C. §3604 (emphasis added). The denial of homeowner's property and hazard insurance does in fact make housing unavailable. As the *Dunn* court explained:

> 'Adequate insurance coverage is often a prerequisite to obtaining financing. Insurance redlining, by denying or impeding coverage, makes mortgage money unavailable, rendering dwellings "unavailable" as effectively as

> the denial of financial assistance on other grounds . . . .'

Dunn, 472 F.Supp. at 1109 (*quoting* Memorandum of the General Counsel of Housing and Urban Development to Chester McGuire, Assistant Secretary for Equal Opportunity (Aug. 15, 1978)).[4]

The legislative history of the Act also suggests that Congress intended §3604 to prohibit racial discrimination in the provision of homeowner's property and hazard insurance. The Fair Housing Act was a sweeping statute aimed at replacing ghettos with "'truly integrated and balanced living patterns.'" *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972)(quoting comments of Sen. Mondale). This Court has held that provisions of the Act are owed a broad construction. *See id.* at 212. And numerous courts have held that the scope of the phrase "otherwise make unavailable or deny" is "as broad as Congress could have made it." *See, e.g., United States v. Housing Auth. of City of Chickasaw*, 504 F.Supp. 716, 726 (S.D.Ala. 1980); *Dunn*, 472 F.Supp. at 1108; *United States v. Hughes Memorial Home*, 396 F.Supp. 544, 549 & n.5 (W.D.Va. 1975); *United States v. Youritan Constr. Co.*, 370 F.Supp. 643, 648 (N.D.Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975); *Zuch v. Hussey*, 366 F.

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[4] The fact that H.U.D. took this position in advance of promulgating formal regulations interpreting §3604 as prohibiting insurance redlining does nothing to detract from the force of the regulations that were issued. To the contrary, it may well be an indicator of the result that Congress sought in its 1988 Amendments to the Fair Housing Act. As the Seventh Circuit observed, when Congress delegated to H.U.D. the authority to promulgate regulations interpreting the Act, it did so "with knowledge that since 1978 a succession of Secretaries" have believed that insurance redlining renders housing "unavailable" for purposes of the Act. Pet.App. at 23a.

Supp. 553, 557 (E.D. Mich. 1973); *see also Mayers v. Ridley*, 465 F.2d 630, 635 (D.C.Cir. 1972)(*en banc*)(Fair Housing Act to be read "expansively in order to fulfill [its] purpose"). In any case, even if one could plausibly argue about the meaning of the statutory language, that uncertainty has been settled by H.U.D.'s authoritative interpretation of the statute. *See* IB, *infra*.

Finally, it would be premature for this Court to grant *certiorari* and resolve the Fair Housing Act question at this time. The lower federal courts have had little opportunity to review the regulations that petitioner challenges. To date, the Seventh Circuit is the only circuit that has subjected these regulations to judicial review. *See* Pet.App. at 1a. Granting the writ and resolving the issue at this time would deprive this Court of the benefit of the lower courts' analysis of the H.U.D. regulations and the proper scope of the Fair Housing Act. It would thus prevent those courts from "serv[ing] as laboratories in which the issue receives further study" before this Court addresses it. *McCray v. New York*, 461 U.S. 961 (1983)(Stevens, J., opinion respecting denial of petitions for writs of *certiorari*).

There is no compelling reason not to allow lower courts the opportunity to consider the H.U.D. regulations before this Court steps in and resolves the issue. Petitioner does not claim that if it succeeded in overturning the Seventh Circuit's ruling it would be freed from liability for any racial discrimination it may have engaged in while providing homeowner's property and hazard insurance. To the contrary, it concedes that Wisconsin state law prohibits such practices. *See* p.4, *supra*. Furthermore, respondents' state-law claims would proceed to trial in any event. Under these circumstances, plenary review is neither necessary nor warranted at this preliminary stage in the proceedings.

B. The Seventh Circuit's Decision Correctly Applies This Court's Decisions On The Deference Owed To Administrative Agencies And The Scope Of The Fair Housing Act

The Seventh Circuit appropriately deferred to agency regulations directly on point in construing the Fair Housing Act. The H.U.D. regulations on which the Seventh Circuit relied expressed the Secretary's expert determination that the conduct prohibited by §3604 of the Fair Housing Act included "[r]efusing to provide .... property or hazard insurance for dwellings or providing such .... insurance differently because of race." 24 C.F.R. §100.70(d)(4).

In upholding the validity of the regulations, the Seventh Circuit appropriately began by considering the text and history of §3604. *See* Pet.App. at 16a-23a. It then analyzed the regulations and the history of their adoption, and determined that §3604 of the Act "can bear the Secretary's construction." *Id.* at 23a. Given this conclusion, the circuit court found that it was bound by this Court's precedents in *Chevron*, 467 U.S. 837, and *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. __, 111 S.Ct. 2524, 2534-36 (1991), to accept the agency's construction of the statute.

Petitioner misreads this Court's holding in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), to argue that the Seventh Circuit deferred improperly to H.U.D.'s construction of the Fair Housing Act. This Court has long made clear, both before *Adams Fruit* and after, that judicial deference to an agency's construction of a statute is appropriate when Congress has delegated policy-making authority to the agency either through (1) "express delegation," or (2) "the introduction of an interpretive gap in the statutory structure." *Pauley v. Bethenergy Mines*, 111 S.Ct. at 2534. Because the regulations that petitioner challenges are authorized by both of these forms of congressional delegation, the Seventh Circuit's deference to

the regulations was correct.

H.U.D.'s regulations interpreting §3604 of the Fair Housing Act to apply to discrimination in the provision of homeowner's property and hazard insurance are clearly supported by an "express delegation." When Congress amended the Act in 1988, it passed §3614a, authorizing H.U.D. to promulgate rules to carry out "this subchapter," which includes 42 U.S.C. §3604 through §3614a. *See* 42 U.S.C. §3614a. In addition to this recent express delegation, this Court has long recognized H.U.D.'s authority to interpret the Fair Housing Act. *See, e.g., Trafficante*, 409 U.S. 205.

The regulations also clearly fill "an interpretive gap in the statutory structure." This Court has instructed that agencies have the power to fill statutory gaps "'left, implicitly or explicitly, by Congress.'" *Chevron*, 467 U.S. at 843 (citation omitted). Even an implicit statutory gap constitutes a congressional delegation, and "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. Section 3604 contains a clear interpretive gap for H.U.D. to fill. This provision makes it illegal to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race . . . ." 42 U.S.C. §3604 (emphasis added). A leading commentator on the Fair Housing Act has described the "otherwise make unavailable or deny" language as a "catch-all phrase." *See* R. Schwemm, HOUSING DISCRIMINATION LAW 48 (1983). This phrase is precisely the kind of statutory gap that is appropriately filled by an agency's expert interpretation.

Adams Fruit is not to the contrary. In *Adams Fruit*, this Court applied these well-established administrative law principles. But the *Adams Fruit* Court found that the agency interpretation at issue was not entitled to *Chevron* deference because there was neither a statutory

gap nor a congressional delegation. The petitioner in *Adams Fruit* contended that the statute at issue had a "statutory gap" because it failed to state specifically that it was not preempted by state law. The Court rightly rejected this argument, stating that "[a] gap is not created in a statutory scheme merely because a statute does not restate the truism that States may not pre-empt federal law." 494 U.S. at 649. This is, of course, far different from the case at bar, in which the statutory gap is created by an express "catch-all phrase" written into the text of the statute.

In addition, the *Adams Fruit* Court found that Congress had not delegated the agency administrative authority over the *enforcement provisions* of the statute at issue in the case. At the same time, the Court found that the agency was indeed authorized to interpret the motor vehicle provisions of the statute that formed the basis of the legal claims in the case. *See id.* at 650 ("Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate standards implementing [the statute's] motor vehicle provisions").

Properly understood, therefore, *Adams Fruit* lends no support to petitioner's argument. Unlike the regulations at issue in *Adams Fruit*, the ones at issue in this case fill a statutory gap and were promulgated pursuant to an express congressional delegation. Also unlike *Adams Fruit*, the regulations in this case do not reach into the sensitive area of the federal judiciary's role in enforcing a congressional enactment. To the contrary, the regulations interpreting §3604 are much more similar to the agency's standards "implementing [the statute's] motor vehicle provisions" that the Court in *Adams Fruit* held to be clearly within the agency's authority.

II. THE SEVENTH CIRCUIT'S RULING ON THE McCARRAN-FERGUSON ACT DOES NOT WARRANT REVIEW

The interpretation of the McCarran-Ferguson Act adopted by the court below is consistent with this Court's pronouncements on preemption and consistent in result, if not always in analysis, with other federal court decisions in this area. Rather than issue the advisory opinion that petitioner seeks, therefore, *certiorari* should be denied.

A. The Decision Below Correctly Applied The Law On Preemption

The McCarran-Ferguson Act provides that: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. §1012(b). The Seventh Circuit's ruling is a straightforward application of the language of the McCarran-Ferguson Act.

As the Seventh Circuit held, "[t]he McCarran-Ferguson Act establishes a form of inverse preemption, letting state law prevail over general federal rules -- those that do not 'specifically relate[] to the business of insurance." Pet.App. 9a. However, as the Seventh Circuit also noted, the language of the McCarran-Ferguson Act contemplates this "inverse preemption" only if general federal rules "invalidate, impair or supersede" state regulation. Applying that statutory mandate in the context of this case, the Seventh Circuit appropriately asked: "What state law regulating the business of insurance does Title VIII 'invalidate, impair, or supersede'?" Pet.App. at 13a; *SEC v. National Securities, Inc.*, 393 U.S. 453, 462 (1969). The answer is none. As Judge Easterbrook observed: "American Family has not drawn to our attention . . . any law, regulation, or decision in Wisconsin re-

quiring redlining, condoning that practice, committing to insurers all decisions about redlining, or holding that redlining with discriminatory intent (or disparate impact) does not violate state law."[5] Pet.App. at 16. In the absence of any inconsistent state regulation, the preemption provisions of the McCarran-Ferguson Act simply do not apply.

Only last Term, this Court made clear that the scope of a preemption provision "is governed entirely by the express language in [the Act]." *Cippollone v. Liggett Group, Inc.*, 505 U.S. __, 112 S.Ct. 2608, 2618 (1992):

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicum of' congressional intent with respect to state authority,' 'there is no

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[5] The fact that federal law may treat differently conduct that state law also prohibits does not necessarily -- and certainly not in this case -- establish the sort of inconsistency necessary to trigger the preemption provisions of the McCarran-Ferguson Act. *See California v. ARC America Corp.*, 490 U.S. 93 (1989)(holding that states may require offenders to pay damages to indirect purchasers, in addition to the treble damages required under federal law to direct purchasers); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985)(holding that local ordinances imposing requirements beyond federal regulations cannot be stricken down as being in conflict with the federal scheme where those requirements do not imperil the federal goal); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984)(holding that states may duplicate federal law in requiring businesses pay punitive damages, even though federal law sets a much lower cap on monetary liability). Petitioner has submitted no evidence that the purposes of the state of Wisconsin would be frustrated if a federal cause of action were recognized in this case. Certainly, the state of Wisconsin has not come forward to make this claim. Pet.App. at 16a; *see Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 721.

> need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation.

Id. (citations omitted). Conversely, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.* The McCarran-Ferguson Act is no exception.

These principles were faithfully applied by the Seventh Circuit to the preemption provision contained in the McCarran-Ferguson Act. More generally, the Seventh Circuit adhered to this Court's observation that "the starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979); *see Union Labor Life Ins. Co. v. Perino*, 458 U.S. 119 (1982); *SEC v. National Securities, Inc*, 393 U.S. 453.

Petitioner would like to read the phrase "invalidate, impair or supersede" out of the McCarran-Ferguson Act for purposes of this case and substitute instead a total ban on any federal regulation that touches on insurance or affects the business of insurance companies.[6] A petition for *certiorari*, however, is not the solution to petitioner's problems. If petitioner wants to rewrite the McCarran-Ferguson Act, its pleas should be addressed to Congress and not to this Court.

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[6] Petitioner grossly overstates the relevance of *FTC v. National Casualty Co.*, 357 U.S. 560 (1958), for purposes of this case. The holding in *Nationwide Casualty* rested on the existence in the McCarran-Ferguson Act of a specific and broad preemption provision for the Federal Trade Commission Act, 357 U.S. at 562, n.2, which has no application to respondents' Title VIII challenge to insurance redlining.

B. There Is No Conflict Between The Circuits On This Issue

1. The Seventh Circuit's Ruling Is Consistent With The Fourth Circuit's Ruling In *Mackey*

There is no conflict between the Seventh Circuit's decision and any other federal court of appeals decision regarding the impact of the McCarran-Ferguson Act on the applicability of the Fair Housing Act to the practice of insurance "redlining." To the contrary, the Seventh Circuit's analysis of the McCarran-Ferguson Act is in accord with the *Mackey* decision by the Fourth Circuit, the only other federal court of appeals to rule on the applicability of the Fair Housing Act to insurance "redlining."

As the Seventh Circuit did, the Fourth Circuit in *Mackey* applied McCarran-Ferguson's "invalidate, impair or supersede" language to any potentially applicable state law or regulation. Like the Seventh Circuit here, the Fourth Circuit determined that there was not "any law enacted by North Carolina which would be 'impaired' by application of the Fair Housing Act . . . ." *Mackey*, 724 F.2d at 421. "In these circumstances, barring these claims is unnecessary to the effectuation of the congressional goals in enacting McCarran-Ferguson, insuring that the states retain the power to regulate the business of insurance and providing regulated insurance companies with a limited exemption from the antitrust laws." *Id.*

The decisions of the Fourth and Seventh Circuits are consistent with the decisions of every other federal court which has addressed this issue. Since 1979, federal courts have consistently found the McCarran-Ferguson Act not to be a barrier to addressing the problem of insurance "redlining" through the Fair Housing Act. *See McDiarmid v. Economy Fire & Casualty Co.*, 604 F.Supp. at 108-09; *Pierce v. Metropolitan Property and Liability*

Ins. Co., No. C-3-82-044 (S.D. Ohio Nov. 25, 1983); *Dunn v. Midwestern Indemnity Company*, 472 F.Supp. at 1111-12.

The Seventh Circuit's ruling is thus clear in its application of this Court's precedents and consistent with the prevailing view of the lower courts. *Certiorari* is unwarranted, therefore, on either ground.

2. The Seventh Circuit's Ruling Is Consistent In Result, If Not In Analysis, With The Second Circuit's Decision In *Spirt*

Petitioner suggests that there is a split between the Seventh Circuit and the Second Circuit. This characterization, however, is misleading. In *Spirt v. Teachers Ins. and Annuity Ass'n*, 691 F.2d 1054, 1065 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), the Second Circuit held that the McCarran-Ferguson Act was not applicable to Title VII and that the Act did not apply to any subsequently enacted civil rights legislation. As a part of its opinion in this case, the Seventh Circuit disagreed with the Second Circuit's analysis in *Spirt*, but, for different reasons, obtained the same result: the McCarran-Ferguson Act would not be a bar to respondents' Fair Housing Act claim.

By attempting to elevate this analytic dispute into an argument for *certiorari*, petitioner asks this Court to issue an advisory opinion that will have no meaningful impact on the actual parties. This Court has historically declined to play that role. *Montana v. Imlay*, 506 U.S. __, 113 S.Ct. 444 (1992).

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit should be denied.

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Dated: April 6, 1993

Supreme Court, U

No. 92-1455

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and its Milwaukee Branch (NAACP), CELESTINE LINDSEY, DOROTHY LISTENBEE, JAMES MILNER, DIANE PRATT, MARVIN PRATT, SIMON WILLIAMS, BEVERLY WILLIAMS, and LOIS WOODS, individually and as representatives of a class of all similarly situated persons,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1455

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and its Milwaukee Branch (NAACP), CELESTINE LINDSEY, DOROTHY LISTENBEE, JAMES MILNER, DIANE PRATT, MARVIN PRATT, SIMON WILLIAMS, BEVERLY WILLIAMS, and LOIS WOODS, individually and as representatives of a class of all similarly situated persons,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The National Association of Mutual Insurance Companies ("NAMIC") is comprised of more than 1200 companies throughout the United States that underwrite all forms of insurance, including homeowners' insurance. Founded in 1895, NAMIC exists to promote a financially stable, competitive private insurance industry. In 1991, NAMIC member companies were responsible for almost

$59 billion in direct written premiums for property and casualty insurance alone, representing approximately 26 percent of that business nationwide.

The Seventh Circuit's decision in this case, if allowed to stand, will disrupt profoundly the manner in which the insurance business has been regulated and conducted in this nation for nearly fifty years. That decision creates a new rule that federal regulation does not "invalidate, impair, or supersede" state law within the meaning of the McCarran-Ferguson Act if it can be construed as "parallel" to state regulation. This novel reading of the McCarran-Ferguson Act effectively overturns Congress' careful apportionment of roles for the federal and state governments with respect to the regulation of the business of insurance. It sanctions for the first time the use of federal laws that Congress never specifically applied to the business of insurance to attack insurance practices permitted under state law. Thus, the decision's impact extends far beyond the specific issues in this case and will disrupt the business of many insurance companies, including the members of NAMIC, and the services they provide to the public.

For this reason, and because the Seventh Circuit decision creates a split in the Courts of Appeals regarding the application of the Fair Housing Act to insurance, *see Mackey* v. *Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984), NAMIC and its members have a strong interest in urging this Court to grant the petition for writ of certiorari in this case, and ultimately to reverse the Seventh Circuit's decision.

SUMMARY OF ARGUMENT

This Court should review the decision below in order to correct a seriously erroneous interpretation of the McCarran-Ferguson Act and to resolve the resulting conflict between the federal Courts of Appeals concerning whether the Fair Housing Act applies to the business of

insurance. The Seventh Circuit's revolutionary construction of the McCarran-Ferguson Act will have extremely deleterious consequences for the insurance industry and the system of state regulation that traditionally has governed it.

The Seventh Circuit erroneously held that the Fair Housing Act, which does not specifically address insurance, merely "duplicates" Wisconsin's insurance law and thus may coexist with it without invalidating, impairing, or superseding the State's law within the meaning of the McCarran-Ferguson Act. By so holding, the Seventh Circuit has invited a disruption of the scheme that Congress enacted, nearly a half-century ago, for regulation of the business of insurance. If future judicial decisions apply the Seventh Circuit's rule, a wide range of federal laws that seem to parallel state insurance laws may be held applicable to insurance and, when so applied, effectively will emasculate the ability of the states to achieve a balance among state policies that affect insurance regulation.

The Seventh Circuit ignored the plain meaning of the terms "invalidate," "impair," and "supersede" in the McCarran-Ferguson Act, as well as the legislative history supporting that plain meaning. Contrary to the Seventh Circuit's opinion, those terms do not simply mean "conflict" in the narrowest sense. As repeatedly recognized by this Court and the lower federal courts, application of a federal law to the business of insurance may "invalidate, impair, or supersede" state insurance laws even absent a blatant conflict, by undermining state choices about the nature of and methodology for achieving insurance regulatory goals. In this case, the application of the Fair Housing Act to the business of insurance in Wisconsin has that effect by, for example, threatening the Wisconsin scheme for both preventing discrimination in the provision of property insurance and ensuring broad availability of such insurance through state insurance pools. This is because such insurance pools could be attacked, under

jurisprudence endorsed by nine of the federal Circuits, including the Seventh Circuit, as having a "disparate impact" on groups protected under the Fair Housing Act.

To prevent the decision below from effectively reversing Congress' determination regarding state primacy in the regulation of insurance, without any support from judicial precedent, NAMIC respectfully submits that this Court should grant American Family's petition for a writ of certiorari.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION SERIOUSLY UNDERMINES THE PRIMACY OF STATE REGULATION OF INSURANCE THAT CONGRESS ESTABLISHED IN THE McCARRAN-FERGUSON ACT.

The McCarran-Ferguson Act, enacted by Congress in 1945, established the primacy of the states in the regulation of the business of insurance. It states: "*No* Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance."[1] 15 U.S.C. § 1012(b) (1988) (emphasis added). Insurance companies and state insurance regulators have acted in reliance on this fundamental rule. In this case, the Seventh Circuit has defied legal precedent and policy by holding that the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-3631, applies to the business of insurance, even though (1) the FHA and its legislative history nowhere indicate that the statute is in-

[1] The term "law enacted by any State" is understood to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." *See* 29 U.S.C. § 1144(c)(1) (1988) (Employee Retirement Income Security Act). *See also* 27 U.S.C. § 214(11) (1988) (Federal Alcohol Administration Act ("state law" includes "state statutes, regulations, and principles and rules having the force of law")).

tended to apply to the business of insurance [2] and (2) the application of the FHA to the business of insurance necessarily will interfere with several state laws regulating the business of insurance generally and prohibiting insurance redlining practices specifically.

The crux of the Seventh Circuit's reasoning is that the FHA and the Wisconsin laws regulating discrimination by insurers are parallel rather than inconsistent, and therefore the FHA does not "invalidate, impair, or supersede" Wisconsin insurance law. Although the Seventh Circuit identified a fundamental difference between the state and federal remedies authorized under these statutes, it nevertheless held that the FHA did not, by virtue of this difference, "invalidate, impair, or supersede" the state law. *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 295 (7th Cir. 1992).

As is discussed below (*infra* at 8-12), the Seventh Circuit's premise as to the relationship between the FHA and Wisconsin law is wrong. There is more at issue here than differing penalties in the state and federal statutes: there are conflicts in the purportedly parallel regulatory schemes that go to the basic questions of what conduct by insurers will be deemed actionable and which officials, state or federal, will have the authority to make judgments regarding such conduct. State regulation in this area reflects the integration of state goals and policies over which "duplicate" federal regulation will ride roughshod, a result that the McCarran-Ferguson Act was enacted specifically to prevent.

By rejecting this reality, the Seventh Circuit's decision provides the foundation for similar decisions permitting the application of other federal laws to the business of

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[2] As explained in American Family's Petition for a Writ of Certiorari ("Petition"), the FHA does not, by its terms, apply to the business of insurance, and the legislative history of the FHA confirms the plain meaning of the statute. *See* Petition at 12-14.

insurance that are superficially consistent with state regulation but that in fact will disrupt the state's chosen regulatory system.[3] Thus, the decision threatens to sweep aside long-standing practices in insurance regulation and the conduct of the business of insurance.

Had Congress intended the consequences of the Seventh Circuit's decision, all that it had to do, at any of several opportunities, was to add a single word to the FHA.[4] In the absence of such congressional action, this Court should not allow such revolutionary consequences to occur without review. Review is particularly critical in light of the weakness of the foundation upon which the Seventh Circuit's new view of the McCarran-Ferguson Act is based.

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[3] For example, under the Seventh Circuit's reading of the McCarran-Ferguson Act, a federal statute such as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, which authorizes private rights of action for treble damages and recovery of attorney fees in cases involving fraudulent use of the mails or wires, might be used to challenge solicitations of insurance, even though the states pervasively regulate insurance solicitation practices. Following the rationale of the Seventh Circuit, as long as RICO simply seems to create a more powerful weapon for use against practices otherwise subject to state regulation, it could apply to "the business of insurance."

[4] Congress specifically rejected attempts to amend the FHA to cover property insurance in 1980, 1983, 1986, and 1988. *See* 126 Cong. Rec. 31,696, 32,350-51, 32,353, 32,991-92 (1980) (objections to H.R. 5200, 96th Cong., 2d Sess. (1980)); S. 1220, 98th Cong., 1st Sess. (1983); H.R. 3482, 98th Cong., 1st Sess. (1983); S. 2040, 99th Cong., 2d Sess. (1986); H.R. 4119, 99th Cong., 2d Sess. (1986); *compare* H.R. 1158, 100th Cong., 1st Sess. (1987) (specifically referring to hazard insurance) *with* Fair Housing Act Amendments of 1988, Pub. L. No. 100-430, 102 Stat. 619 (1988) (omitting mention of hazard insurance).

II. THE SEVENTH CIRCUIT WRONGLY INTERPRETED AND APPLIED THE McCARRAN-FERGUSON ACT.

A. The Seventh Circuit Misinterpreted the Plain Meaning of the McCarran-Ferguson Act.

As this Court recently emphasized in *Reves* v. *Ernst & Young*, —— U.S. ——, 113 S. Ct. 1163 (1993), the first task for a court in construing the scope of a statutory provision is to examine the plain language of the statute. If that language is unambiguous, then it should be deemed conclusive, assuming there is no clearly expressed legislative intent to the contrary. *Id.* at 1169.

The Seventh Circuit has misapplied that basic rule of statutory construction in this case. Its reading of the McCarran-Ferguson Act fails to acknowledge the plain meaning of the terms "invalidate," "impair," and "supersede."

"Impair" means "[t]o make worse, less valuable, or weaker." "Invalidate" means "to destroy the validity or strength of . . .; to render of no force or effect; esp., to deprive of legal efficacy." "Supersede" means "to render superfluous or unnecessary; to preclude the necessity of; . . . to make of no effect." *Oxford English Dictionary* (compact ed. 1971). Not just one, but each of these definitions accurately describes the effect of the FHA on Wisconsin law regulating the business of insurance.[5]

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[5] Even if the plain meaning of the terms "impair," "invalidate," and "supersede" did not so clearly establish that the McCarran-Ferguson Act precludes application of the FHA in this case, the legislative history of the McCarran-Ferguson Act would confirm that conclusion. *See Reves*, 113 S. Ct. at 1170-72 (discussing how legislative history supported understanding of statute's plain meaning). The Act was designed to "affirm the intent of the Congress that the regulation of the business of insurance remain within the control of the several States." H.R. Rep. No. 873, 78th Cong., 1st Sess. 1 (1943). Significantly, the House Judiciary Committee re-

B. The Seventh Circuit Ignored the Manner in Which the Fair Housing Act, If Applied to Insurance, Would Invalidate, Impair, or Supersede Wisconsin Laws and Regulations.

Wisconsin law explicitly prohibits discrimination by "person[s] in the business of insuring against hazards, by refusing to enter into, or by exacting different terms, conditions or privileges with respect to, a contract of insurance against hazards to a dwelling." Wis. Stat. Ann. § 101.22(2)(e) (West 1992). The state law also explicitly forbids racial discrimination by casualty insurers. Wis. Stat. Ann. § 628.34(3) (West 1992). Since the FHA generally duplicates the mandates of these state laws, it makes the state laws "unnecessary," and therefore "supersedes" them. *See supra* at 7 (definition of "supersede").

The Wisconsin statutes prohibiting discrimination in the business of insurance, taken together, constitute a single manifestation of the state's regulatory goals on the issue. The application of the FHA to the business of insurance interferes with the methods by which the state has chosen to meet these goals. For example, it "render[s] of no force or effect" Wisconsin's choice to preclude private rights of action in redlining cases.[6]

The FHA and the Wisconsin insurance antidiscrimination laws collide, moreover, on the crucial issues of what

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jected the Department of Justice's insistence that the federal government should be able to interfere with state insurance regulation whenever it deemed such regulation to be inadequate. The Committee maintained that "[i]f the states are to be permitted to regulate, they should be permitted to regulate as they see fit." *Id.* at 7.

[6] *See Kranzush* v. *Badger State Mut. Casualty Co.*, 307 N.W.2d 256, 268-69 (1981) (discussing intent of Wisconsin legislature and regulatory authorities to limit enforcement of state law forbidding "unfair" insurance practices to administrative officials).

conduct is actionable and who shall have the burdens of proof and persuasion at trial. Nine of the federal circuits, including the Seventh Circuit, *see Metropolitan Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1289-90 (1977), *cert. denied*, 434 U.S. 1025 (1978), permit a claim under the FHA to rest on proof of disparate impact.[7] Under Wisconsin insurance law, however, discrimination cannot be established absent proof of disparate treatment, *i.e.*, intent to discriminate. *See American Family*, 978 F.2d at 292-93.

This fundamental discrepancy between federal and state law is consequential for precisely the reasons acknowledged in the Seventh Circuit's opinion: the very "nature of insurance" requires insurers to discriminate as to risks. As the Seventh Circuit recognized: "Insurance works best when the risks in the pool have similar characteristics. . . . To curtail adverse selection, insurers seek to differentiate risk classes with many variables." *Id.* at 290. Such differentiation, based solely on the identification of risks and without regard to race, may lead to less advantageous policies (such as those with higher premiums or deductibles) for some insurance customers, or to the decision

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[7] *See Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 934 (2d Cir.), *review declined in relevant part*, 488 U.S. 15, 18 (1988); *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 986-88 (4th Cir. 1984); *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur* v. *City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Keith* v. *Volpe*, 858 F.2d 467, 482-84 (9th Cir. 1988), *cert. denied*, 493 U.S. 813 (1989); *Elliot* v. *City of Athens*, 960 F.2d 975, 981 (11th Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 376 (1992); *compare with Asbury* v. *Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989) (requiring proof of discriminatory intent). This Court has yet to decide whether proof that a practice has a disparate impact, absent evidence of disparate treatment, may suffice to establish a violation of the FHA. *Town of Huntington* v. *Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988).

that some would-be customers are uninsurable. Engaging in risk differentiation, which is integral to the business of insurance, could, under the Seventh Circuit's decision, render insurers vulnerable to charges of disparate impact discrimination—simply for doing what is inherent in the "nature of insurance."

The incongruity of that result is particularly stark in states such as Wisconsin that have established Fair Access to Insurance Requirements ("FAIR") plans.[8] Congress specifically encouraged the states to establish FAIR plans pursuant to the Urban Property Protection and Reinsurance Act of 1968 ("UPPRA"), a statute enacted just three months after the adoption of the FHA. Pub. L. No. 90-448 §§ 1101-1102, 82 Stat. 555-556 (1968). UPPRA created incentives for insurers and state regulators to address the issue of access to basic property insurance, including, in a number of states, homeowners' insurance. In enacting UPPRA, Congress envisioned the preservation of the basic structure of state-regulated insurance rating systems based on cost-based rate classifications, including territorial factors.

If the Seventh Circuit rule applies, policyholders who obtain insurance through FAIR plans could claim, in federal court, that insurers have discriminated against them in violation of the FHA by offering them insurance under a FAIR plan rather than under regularly marketed policies.[9] If such a federal claim were successful, the state courts and insurance regulators could be estopped from making their own findings that better reflect the

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[8] *See* Wis. Stat. Ann. § 619.01 (West 1992); Wis. Admin. Code § Ins 4.10 (April 1992).

[9] Ironically, such a claim would involve attacking a mechanism (the FAIR plan) designed to make property insurance available, when the very objective of the FHA is "making available" residential real estate.

state's statutory and regulatory priorities.[10] Moreover, if such a claim were brought in any of the nine Circuits that read the FHA as authorizing proof of discrimination based on a showing of disparate impact, the claim might be established merely through an analysis of the race (or other protected classification) of the urban area residents served by the FAIR plan.

The FAIR plans serve an important, mutual state and federal goal: to provide, on a subsidized basis, basic property insurance in urban areas under the supervision of state insurance regulators. The application of the FHA would threaten—"impair," if you will—the FAIR plans and therefore the ability of the states to achieve this goal. *See Fireman's Ins. Co.* v. *Washington*, 483 F.2d 1323, 1331 (D.C. Cir. 1973) (application of anti-discrimination regulation to property insurance conflicts with FAIR plan's "equitable distribution of the hazards posed by . . . high-risk properties among private insurers."). Simply labeling the state and federal regulatory schemes as parallel or consistent masks the serious potential for erosion of state initiatives such as the formation and implementation of the FAIR plans.

The Seventh Circuit itself has conceded that "[u]ndoubtedly there is a sense in which any overlap between state and federal law upsets a balance struck by one of the two legislatures." *American Family*, 978 F.2d at 295, *citing Gade* v. *National Solid Wastes Management Ass'n*, —— U.S. ——, 112 S. Ct. 2374, 2385-86 (1992). The court further noted that "[o]ne could say that a federal rule increasing the probability that a state norm will be vindicated (or augmenting the damages assessed in the event of a violation) conflicts with a decision by the state that remedies should be limited or rare." *American Fam-*

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[10] *See Ward* v. *Harte*, 794 F. Supp. 109, 118 (S.D.N.Y. 1992) (finding defendant in private suit under federal law to be collaterally estopped from challenging previous county regulatory finding of housing discrimination).

ily, 978 F.2d at 295. Yet the Seventh Circuit refused to recognize the extent to which the imbalance and conflict it noted are "impairments" within the meaning of the McCarran-Ferguson Act.

C. The Rationale of the Seventh Circuit for Its Interpretation and Application of the Act Is Inconsistent with This Court's Precedents.

The Seventh Circuit's new construction and application of the McCarran-Ferguson Act is inconsistent with this Court's previous consideration of the regulatory system established by the Act. For example, in *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 68 (1959), this Court expressed "a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements." *See also Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946) ("[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance . . . by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future [federal] legislation."); *FTC* v. *National Casualty Co.*, 357 U.S. 560, 563 (1957) (McCarran-Ferguson Act "withdrew from the Federal Trade Commission the authority to regulate [insurance companies'] advertising practices in those States which are regulating those practices under their own laws," without any exception for "parallel" regulation).

The Seventh Circuit's narrow view of the McCarran-Ferguson Act is also at odds with well-established principles of preemption. In *Gade* v. *National Solid Wastes Management Ass'n*, —— U.S. ——, 112 S. Ct. 2374 (1992), this Court rejected an argument that is echoed in the Seventh Circuit's rationale here. In *Gade*, the peti-

tioner argued that the Occupational Safety and Health Act does not preempt "nonconflicting state laws because those laws, like the Act, are designed to promote worker safety." *Id.* at 2385. In turning that argument aside, this Court wrote:

> In determining whether state law "stands as an obstacle" to the full implementation of a federal law, . . . "it is not enough to say that the ultimate goal of both the federal and state law" is the same. . . . "A state law also is preempted if it *interferes with the methods* by which the federal statute was designed to reach th[at] goal."

Id. (emphasis added) (citations omitted). For precisely the reason articulated in that statement by this Court in *Gade*, the Seventh Circuit's narrow reading of the McCarran-Ferguson Act is fundamentally flawed, and threatens to turn the Act's well-understood function on its head without justification.

CONCLUSION

For all the foregoing reasons, NAMIC respectfully submits that the Court should grant American Family's petition for a writ of certiorari.

Respectfully submitted,

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April 8, 1993

Supreme Court, U.S.
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IN THE
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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and its Milwaukee Branch (NAACP), CELESTINE LINDSEY, DOROTHY LISTENBEE, JAMES MILNER, DIANE PRATT, MARVIN PRATT, SIMON WILLIAMS, BEVERLY WILLIAMS, and LOIS WOODS, individually and as representatives of a class of all similarly situated persons,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the McCarran-Ferguson Act precludes the application of the Fair Housing Act to companies writing homeowners insurance subject to regulation under state insurance laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1455

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and its Milwaukee Branch (NAACP), CELESTINE LINDSEY, DOROTHY LISTENBEE, JAMES MILNER, DIANE PRATT, MARVIN PRATT, SIMON WILLIAMS, BEVERLY WILLIAMS, and LOIS WOODS, individually and as representatives of a class of all similarly situated persons,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE *

The National Association of Independent Insurers (the "Association") is the largest association of property and casualty insurers in the country. It represents over

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* Counsel for all parties have consented to the filing of this amicus brief. *Amicus* has filed those consents with the Clerk of this Court.

560 property and casualty insurers that write over one-quarter of the property insurance sold in the United States. The Association regularly represents the interests of its members in cases before the Court that vitally affect the insurance industry.

The central issue presented in this case—whether Congress intended by the Fair Housing Act to subject insurance companies writing homeowners insurance to potentially conflicting state and federal regulation—is a matter of substantial concern to the Association and its members. The Association strongly opposes the use of race in insurance classifications, apart from any consideration of the risk involved. The Association believes, however, that the Fair Housing Act is not the proper vehicle for addressing this reprehensible practice. In the McCarran-Ferguson Act, Congress left "the business of insurance," including the regulation of insurance risk selection, to the states.

Because the Seventh Circuit's decision threatens this allocation of authority between the federal government and the states, the Association's members are vitally interested in this case. The Association, therefore, submits this brief to offer the unique perspective of the insurance industry on the importance of granting the Petition.

STATEMENT

Respondents filed a class action complaint against Petitioner on July 27, 1990, alleging that Petitioner had discriminated on the basis of race in the sale of homeowners insurance, thereby violating, *inter alia*, the federal Fair Housing Act and the Wisconsin Insurance Code. Petitioner moved to dismiss the claims arising out of the Fair Housing Act and the state insurance law for failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6). The district court granted that motion on December 11, 1990, and thereafter or-

dered entry of a partial final judgment on those claims. *See* Fed. R. Civ. P. 54(b).

The Seventh Circuit reversed in part and affirmed in part. Although it agreed with the district court that the Wisconsin Insurance Code (unlike the Fair Housing Act) created no private right of action, it disagreed with the district court in regard to Respondents' Fair Housing Act claim. In an opinion by Judge Easterbrook, the court first held that the McCarran-Ferguson Act's "inverse preemption" of federal law in favor of state law did not apply here; even though the court held that the McCarran-Ferguson Act applied to the subsequently-enacted Fair Housing Act, the court concluded that the McCarran-Ferguson Act did not preclude application of the Fair Housing Act since the Fair Housing Act merely duplicated state insurance laws forbidding "unfair discrimination." Pet. App. 13a-14a. Second, the court held that the Fair Housing Act could be construed to regulate the writing of homeowners insurance. *Id.* at 23a.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision creates a triple conflict. In order to reach its conclusion that the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (1988), applies to regulate the writing of homeowners insurance, the Seventh Circuit had to break ranks with two other courts of appeals' precedents, and overrule one of its own.

> *First*, to hold that the Fair Housing Act "applies to discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant," Pet. App. 24a, the court of appeals had to depart from the Fourth Circuit's holding in *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 424 (4th Cir. 1984), that the Fair Housing Act "was not intended to reach the hazard insurance industry."

Second, to hold that the McCarran-Ferguson Act applies to the Fair Housing Act, Pet. App. 12a-13a, the court's decision had to break from the Second Circuit's holding in *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1065 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), that the McCarran-Ferguson Act does not preclude application of subsequently-enacted civil rights laws, *i.e.*, Congress "had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as 'the business of insurance.' "

Third, to hold that the McCarran-Ferguson Act nonetheless does not preclude application of the Fair Housing Act in this case because the Fair Housing Act's "[d]uplication" of Wisconsin law "is not conflict," Pet. App. 13a, the Seventh Circuit was forced to overrule one of its own precedents, *Lowe v. AARCO-American, Inc.*, 536 F.2d 1160, 1161-62 (7th Cir. 1976) (per curiam), which held that a federal statute duplicative of the terms of state law does "invalidate, impair, or supersede" state law in violation of the McCarran-Ferguson Act. *See* Pet. App. 15a.

These conflicts did not go unacknowledged by the court of appeals; indeed, the court understood that its opinion "overrules *Lowe* to the extent that *Lowe* holds that the McCarran-Ferguson Act prevents the application of federal laws duplicating state rules, and . . . conflicts with both the second circuit's views in *Spirt* and the fourth circuit's holding in *Mackey*." Pet. App. 27a.

The triple conflict involving the interpretation of two important federal statutes, the Fair Housing Act and the McCarran-Ferguson Act, should be a compelling enough reason for this Court to grant review. But there are other compelling reasons as well. By applying the Fair Housing Act to the business of insurance, the Seventh Circuit up-

set the balance that the McCarran-Ferguson Act strikes between federal and state authority over the "business of insurance." Sound policy reasons, which we address below, further underscore the incorrectness of the Seventh Circuit's decision. For all of these reasons, certiorari should be granted.

A. THE SEVENTH CIRCUIT'S DECISION UNDERMINES THE AUTHORITY OF THE STATES TO REGULATE INSURANCE.

By holding that the Fair Housing Act may be applied to sellers of homeowners insurance, the Seventh Circuit has misconstrued the McCarran-Ferguson Act in a manner that threatens "the continued supremacy of the States," *SEC v. National Securities, Inc.*, 393 U.S. 453, 459 (1969), in regulating the business of insurance. If permitted to stand, the court of appeals' decision will have a tremendous impact on thousands of insurers previously subject only to state regulations. Only this Court can prevent this usurping of state authority in the insurance field.

1. Congress enacted the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1988), to further its determination "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. *See also* S. Rep. No. 20, 79th Cong., 1st Sess. 2 (1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. 2-3 (1945). Congress's primary goal, in the wake of this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (holding that insurance transactions were subject to federal regulation under the Commerce Clause), was to enact legislation "that would ensure that the States would continue to have the ability to tax and regulate the business of insurance."

Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217-18 (1979). To ensure the states' primacy in this field, the McCarran-Ferguson Act provides:

> (a) State regulation.
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation.
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance[.]

15 U.S.C. § 1012.

To determine whether a federal statute is inapplicable to conduct by virtue of the McCarran-Ferguson Act, courts have undertaken a four-part inquiry based on the statute. *First*, if the federal statute specifically relates to "the business of insurance," preclusion of the federal law is inappropriate. *See* 15 U.S.C. § 1012(b); *SEC v. National Securities, Inc.*, 393 U.S. at 459-61. *Second*, preclusion of the federal statute is also inappropriate unless the state has enacted law for the purpose of regulating insurance activities. *Id.* at 457-59; *FTC v. National Casualty Co.*, 357 U.S. 560, 563-65 (1958). *Third*, a federal statute can only be precluded if the activities underlying the cause of action are "the business of insurance" within the meaning of the Act. *SEC v. National Securities, Inc.*, 393 U.S. at 459-60; *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. at 210. And *fourth*, the federal statute will be precluded only if it would "invalidate, impair, or supersede" any state law regulating insurance. 15 U.S.C. § 1012(a); *see also SEC v. National Securities, Inc.*, 393 U.S. at 463. All four prongs must be satisfied

for the McCarran-Ferguson Act to preclude application of a federal statute.

2. The Seventh Circuit found the first three prongs satisfied, but not the fourth. It held (a) that the Fair Housing Act did not specifically relate to the business of insurance,' *see* Pet. App. 9a-10a; (b) that the State of Wisconsin has enacted laws to regulate insurance activities, *see id.* at 13a, 24a-26a; and (c) that the challenged activities of Petitioner were "the business of insurance." *See id* at 10a. The court concluded, however, that the Fair Housing Act did not "invalidate, impair or supersede" Wisconsin law because the Fair Housing Act was merely duplicative of Wisconsin law, and—in Judge Easterbrook's words—"[d]uplication is not conflict." Pet. App. 13a. This holding was in error.

The Seventh Circuit reached this erroneous conclusion by relying on analogy instead of relying on the words of the McCarran-Ferguson Act:

> The McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict with (and so are preempted by) federal law are pertinent in deciding when federal rules "invalidate, impair, or supersede" state rules.

Pet. App. 14a. But principles of federal preemption are not so easily transferable to the language of the McCarran-Ferguson Act. Federal preemption of state legislation is based on the Supremacy Clause of Article VI of the Constitution, which simply provides that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The McCarran-Ferguson Act, in contrast, contains very different language: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ."

The analogy fails because even where a federal statute *duplicates* a state's regulation of insurance, the mere availability of the alternative federal remedy "impairs" the state's ability to regulate "the business of insurance" through a uniform regulatory system. Moreover, having duplicative federal remedies allows plaintiffs to bring insurance-related cases in federal court by invoking federal-question jurisdiction, instead of bringing them in state court or before state regulators. In such a case, the federal statute effectively "supersedes" the state's authority to dictate where and how the business of insurance will be regulated. Thus, although "duplication" may not be "conflict" in a Supremacy Clause sense, the duplication certainly "impairs" and "supersedes" state law in violation of the McCarran-Ferguson Act.

3. The decision below, applying the Fair Housing Act to homeowners insurance regulated under Wisconsin law, effectuates precisely such an impairment. The McCarran-Ferguson Act recognizes that the business of insurance is "fundamentally local in character, and therefore best regulated by the States." H.R. Rep. No. 873, 78th Cong., 1st Sess. 9 (1943). In order to fulfill McCarran-Ferguson's mandate, the State of Wisconsin has enacted a comprehensive and integrated insurance code (two full volumes of the *Wisconsin Statutes Annotated*). Moreover, like every other state, *see* Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 8.1(c), at 937 (Practitioner's ed. 1988), "Wisconsin maintains a substantial administrative apparatus regulating the conduct of insurers," Pet. App. 26a, which is administered by a Commissioner of Insurance. *See* Wis. Stat. Ann. §§ 601.11-601.73 (West 1980 & Supp. 1992). In enacting its insurance code, the Wisconsin Legislature sought to "create[] a simple and consistent framework for the enforcement of the insurance laws." Wis. Stat. Ann., ch. 601 Committee Comment (1969). Two of the stated purposes of the Wisconsin insurance code bear out Wisconsin's intent to regulate

comprehensively the business of insurance: to "provide for an office that is expert in the field of insurance," and to "improve and thereby preserve state regulation of insurance." Wis. Stat. Ann. § 601.01(d), (f) (West 1980 & Supp. 1992).

a. The court of appeals' decision plainly allows the Fair Housing Act to "impair" Wisconsin's insurance code. Wisconsin prohibits "unfair discrimination" in setting insurance rates, *see* Wis. Stat. Ann. § 625.11(1); Wis. Admin. Code § Ins 6.68 (April 1992), which is the practice that Respondents seek to challenge under the Fair Housing Act. Under Wisconsin's scheme, the Insurance Commissioner must be certain that insurance practices reflect an individual's contribution to the risk pool, and must resolve such questions as whether classifications based on location are equitable and, if not, what procedure should be prescribed to eliminate the improper classifications.

The Seventh Circuit recognized that Wisconsin's insurance code prohibits unfair discrimination in setting insurance rates, although it also held that the section allows for only administrative, and not judicial, enforcement. *See* Pet. App. 25a; *see also* Wis. Stat. Ann. §§ 625.11(4), 628.34(3)(a), (11), (12) (West 1980 & Supp. 1992). But the fact that "Wisconsin wants such contentions submitted to administrators rather than judges," Pet. App. 26a, completely undermines any serious argument for concurrent state and federal regulation—Wisconsin clearly wants these claims brought by its Commissioner of Insurance, who possesses the expertise and long-term vision that will help the insurance law "maintain its vitality and relevance." Wis. Stat. Ann. ch. 601 Committee Comment (1969). Allowing judicial enforcement of the Fair Housing Act in lieu of the state administrative procedures clearly "impairs" Wisconsin's preference to have "such contentions submitted to administrators rather than judges." Pet. App. 26a.

b. The Seventh Circuit's decision also allows the Fair Housing Act to "supersede" the Wisconsin insurance code. It takes the regulation of insurance away from the unitary guidance of the state insurance department and gives it, in part, to the piecemeal litigation process. Persons claiming "unfair discrimination" in the setting of insurance rates now may shop for the forum that suits them. They may even completely bypass state administrative processes—such as Wisconsin's—in favor of a judicial proceeding brought under the Fair Housing Act. The Seventh Circuit's decision thus replaces state insurance commissioners' unitary regulatory authority with the interstitial judicial decisionmaking process, a result at odds with the fundamental assumptions underlying the McCarran-Ferguson Act:

> All insurance policies are entered into in one State or another and that State in which they are entered into may through State regulation meet all problems presented. If regulation be undertaken by the Federal Government this must inevitably result in a general pattern which is not applicable in meeting the requirements of the different States as they should be met and as those States now meet them.

H.R. Rep. No. 873, 78th Cong., 1st Sess. 9 (1943).

In sum, the Seventh Circuit's decision allows the Fair Housing Act to interfere with the regulation of insurance, insurers' risk assessments, and rate-setting, matters long reserved for the authority of the several states. The Court should intervene to prevent these matters from being subjected to a patchwork of federal and state authority.

B. THE FAIR HOUSING ACT DOES NOT, BY ITS TERMS, APPLY TO INSURANCE.

Conceding that its decision conflicts with a decision of the Fourth Circuit, *Mackey v. Nationwide Ins. Co., supra,* the Seventh Circuit held that the Fair Housing Act "applies to discriminatory denials of insurance, and discrimi-

natory pricing, that effectively preclude ownership of housing because of the race of the applicant." Pet. App. 24a. Section 804 of that Act (42 U.S.C. § 3604) makes it unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, *or in the provision of services* or facilities *in connection therewith*, because of race, color, sex, familial status, or national origin.

(emphasis added). To reach the conclusion that the Fair Housing Act regulates insurance, the court of appeals relied on the italicized "catch-all" provision in § 3604(a) and the "services" language in §3604(b); concluded that these sections were ambiguous as applied to the business of insurance; and then allowed *Chevron* deference (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) to do the rest.

Petitioners have covered this legal issue in detail. *See* Pet. Cert. 12-18. Suffice it to say here that neither the language of the Fair Housing Act nor its legislative history makes any reference to homeowners insurance—the Act was not designed to reach "every discriminatory act that might conceivably affect the availability of housing." *Mackey v. Nationwide Ins. Co.*, 724 F.2d at 423. Rather, that Act was intended to eliminate the discriminatory practices of property owners, real estate brokers, builders, and home financiers. 114 Cong. Rec. 2272-84 (1968); *Mackey*, 724 F.2d at 423. The numerous, and unsuccessful, attempts to amend the Fair Housing Act to cover homeowners insurance provide further evidence that the Act, as it is presently written, does not regulate home-

owners insurance. *See, e.g.*, 126 Cong. Rec. 32991 (1980) (remarks of Sen. Heflin).

Applying the Fair Housing Act to the business of insurance poses not only significant legal problems, but important policy concerns as well. Although this Court "has yet to decide whether practices with disparate impact violate Title VIII," Pet. App. 3a (citing *Huntington v. NAACP*, 488 U.S. 15 (1988)), many courts of appeals have concluded that a violation of the Fair Housing may be proved merely by showing a discriminatory impact. *See, e.g., Halet v. Wend Investment Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied sub nom. Whitman Area Improvement Council v. Resident Advisory Bd.*, 435 U.S. 908 (1978); *Metropolitan Housing Dev. Co. v. Village of Arlington Heights*, 558 F.2d 1283, 1289-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Smith v. Anchor Building Corp.*, 536 F.2d 231, 233 (8th Cir. 1976).[1] Thus, regulation of insurance practices under the Fair Housing Act would likely preclude otherwise-permissible allocations of risk. Individuals could no longer be classified as groups, regardless of the peculiar risks inherent in that group, if there would be a discriminatory effect.

Insurance, however, is necessarily based upon risk sharing. Insurance companies accept these risks because they can spread their actual losses "across the board," over the risks accepted. For risk sharing to be fair and equitable, then, insureds must be grouped with other individ-

[1] To be sure, since Respondents' complaint was dismissed pursuant to Fed. R. Civ. P. 12(b)(6), "we must assume that plaintiffs can establish that the defendant intentionally discriminates on account of race." Pet. App. 2a. However, the ultimate question presented in this case—whether the Fair Housing Act applies *at all* to the business of insurance—is a question *of law*, and is thus unaffected by this assumption of fact.

uals possessing similar risks. These groupings are not arbitrary; rather, they are based on the statistical correlation of certain variables that help the company predict the insured's risk of loss.

With homeowners insurance, for example, it may be statistically demonstrated that the location of a dwelling affects the potential for loss. The likelihood of natural disasters, theft or vandalism, as well as the quality of police and fire protection available in the area, all enter into that calculation. Just as rural isolation from police and fire departments can be a negative factor in rate-setting, location in the center of a densely-populated city is also undesirable, because of the increased possibility of manmade calamities. Regina Austin, *The Insurance Classification Controversy*, 131 U. Pa. L. Rev. 517, 542-45 (1983).

Such classifications must have a meaningful actuarial basis, *i.e.*, the classification must group together all of those individuals who have a similar risk of loss. Where there is proper classification, however, the result is what in insurance parlance is called "fair discrimination." "Fair discrimination" does not involve considerations of race or any other impermissible classification; rather, it refers only to classifications based on actuarially-verifiable risks, a proper and necessary step in developing fair insurance rates. Each insured thus pays an appropriate price for the risk that he or she brings to the pool, and anything that departs from that is unfair discrimination. "In fact, the failure to grant a preference in rates reflecting the expense differential results in unfair discrimination." *The Pricing and Marketing of Insurance: A Report of the United States Department of Justice to the Task Group on Antitrust Immunities* 308-09 (1977).

The result of prohibiting such group classifications would be an inequitable distribution of insurance risks and a potential financial peril to many insurers. In effect, low-

risk homeowners would unfairly subsidize high-risk homeowners. In turn, the low-risk individuals would be encouraged to drop out of the risk pool altogether, instead of paying a subsidy for the high-risk members of the pool. Homeowners with safer homes would conclude that the cost of "self-insurance" would be less than the cost of purchasing coverage. Rates formerly set on a risk pool containing safe and less-safe homes, if applied to the remaining, primarily less-safe homes, would be insufficient to cover the accident losses of the insureds. Accordingly, even higher rates would be set, and some companies may drop out of the market altogether. The perverse result that the Seventh Circuit's decision engenders is that application of the Fair Housing Act could make homeowners insurance *less* available.

Finally, one other consideration bears note. The setting of insurance rates is a complex, multi-variable task that is traditionally left to specialized state agencies to regulate. In view of the complexity of the task, and the traditional role of the states in regulating insurance, it is extremely unlikely that Congress, by two "catch-all" phrases in the Fair Housing Act, intended to include the business of insurance within the scope of that Act. The Seventh Circuit properly recognized that the Fair Housing Act and its legislative history were silent on its application to insurance. Pet. App. 20a-21a. But this "silence on the part of the Congress," 15 U.S.C. § 1011, should have made the court of appeals

> reluctan[t] to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of "insurance," they speak with the authority of a long tradition.

SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 68 (1959).

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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